NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service
Washington, D.C.

101ST CONGRESS
2d Session

SENATE

REPORT
101-356

PRODUCT LIABILITY REFORM ACT

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

R E P O R T

together with
ADDITIONAL AND MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1400

JUNE 29, 1990.—Ordered to be printed
Filed under authority of the order of the Senate of June 29 (legislative day, June 11), 1990

U.S. GOVERNMENT PRINTING OFFICE
39-010 WASHINGTON : 1990

5063-19

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ERNEST F. HOLLINGS, South Carolina, *Chairman*

DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
J. JAMES EXON, Nebraska
ALBERT GORE, JR., Tennessee
JOHN D. ROCKEFELLER IV, West Virginia
LLOYD BENTSEN, Texas
JOHN F. KERRY, Massachusetts
JOHN B. BREAUX, Louisiana
RICHARD H. BRYAN, Nevada
CHARLES S. ROBB, Virginia

JOHN C. DANFORTH, Missouri
BOB PACKWOOD, Oregon
LARRY PRESSLER, South Dakota
TED STEVENS, Alaska
ROBERT W. KASTEN, JR., Wisconsin
JOHN McCAIN, Arizona
CONRAD BURNS, Montana
SLADE GORTON, Washington
TRENT LOTT, Mississippi

KEVIN G. CURTIN, *Chief Counsel and Staff Director*
WALTER B. MCCORMICK, JR., *Minority Chief Counsel and Staff Director*

101ST CONGRESS
2d Session

SENATE

REPORT
101-356

PRODUCT LIABILITY REFORM ACT

JUNE 29, 1990.—Ordered to be printed

Filed under authority of the order of the Senate of June 29 (legislative day, June 11), 1990

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1400]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1400) to regulate interstate commerce by providing for a uniform product liability law, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF BILL

The bill, S. 1400, as reported, creates certain standards of product liability law that are to be applied uniformly throughout the United States.

The present system in the United States for resolving product liability disputes and compensating those injured by defective products is costly, slow, inequitable, and unpredictable. It does not benefit manufacturers, product sellers, or injured persons. The system's high transaction costs, which exceed the compensation paid to victims, are passed on to consumers; moreover, the unpredictability, uncertainties, inefficiencies, and costs of the present system

have stifled innovation and have handicapped American firms as they compete in the global economy.

S. 1400, as reported, addresses these problems by making a number of changes in product liability law that are applicable in all product liability actions in State and Federal courts. These balanced changes are intended to reduce transaction costs, provide greater certainty as to the rights and responsibilities of all of those involved in product liability disputes, encourage innovation, and increase the competitiveness of U.S. firms.

Background and Need

Introduction

Traditionally, product liability has been a matter left to State law, but today the morass of product liability law is a problem of national concern that requires Congressional action. The system of compensating people injured by defective products is costly, slow, inequitable, and unpredictable.

Many consumers who are injured by defective products and deserve compensation are unable to recover damages or must wait years for recovery. They are caught up with manufacturers and product sellers in a product liability litigation system in which identical cases can produce startlingly different results. Moreover, injured victims with the severest injuries tend to receive far less than their actual economic losses, while those with minor injuries are overcompensated.

The inefficiency and unpredictability of the product liability system have made it difficult for manufacturers of products, such as machine tools, medical devices, or vaccines, to buy adequate insurance coverage. This unpredictable patchwork of State laws has had a chilling effect on the bringing of new products to market. Moreover, the current U.S. product liability system has hurt our competitive position in world markets because the excessive costs of the system result in higher prices for American products.

Thus, the present system has an adverse impact on plaintiffs and defendants, manufacturers, product sellers, and consumers. The individual states cannot fully address the problems of the product liability system. Reform at the Federal level is urgently needed.

The Present Product Liability System is Costly, Slow, Inequitable, and Unpredictable

The present product liability system does not meet its objective of fairly compensating, in a timely fashion, those who are injured by products. It has been faulted for failing to provide an efficient and equitable means of resolving claims about defective products, but rather pushing parties to pursue costly, time-consuming litigation.

Costs of the Product Liability System.—The present product liability system's transaction costs—the costs of litigation, court costs, and attorney's fees—are enormous. Today, plaintiff and defense lawyers collect almost as much from the system as injured persons do; most of the money paid out by manufacturers never

reaches the injured persons at all.[1] The most recent survey of the membership of the National Machine Tool Builders Association stated that for 79 closed claims settled and litigated in 1989, $2,600,000 was paid out, but only $400,000 (17 percent) went to claimants.[2]

The overall magnitude of these costs continue to grow because of what some have described as a "litigation explosion." [3] In 1980, 9,118 product liability suits were pending in Federal district courts.[4] By the end of 1988, the number of pending product liability cases had risen to 32,617, an increase of 257 percent in 8 years.[5]

The inefficiency of the present system has been noted often, and has been recently demonstrated in a General Accounting Office (GAO) report on product liability actions in five States. According to the GAO report, jury awards for all damages combined ranged from $255 to $10 million; the average jury award was $845,000 and the median $157,000.[6] The average award for compensatory damages alone was $906,000, and the median was $375,000.[7] Punitive damages were awarded in an average amount of $1,300,000, with a median of $400,000.[8] Plaintiffs' attorneys fees average about 35 percent of the money recovered by the client, with actual figures ranging from a low of $1,000 (for a $3,000 recovery) to a high of $3,400,000 (for a $6 million recovery). The average contingency fee was $115,000. Defendants, who paid their attorneys on an hourly fee basis, paid fees ranging from $1,500 to $400,000, with an average of $41,000 and a median of $20,000. [9] The average actual cost of all expenses up to the time a verdict was rendered was $168,000 per case, including attorney fees. GAO noted that the costs to defendants probably were underestimated due to the likelihood that an out-of-State defendant would be more likely to have been represented by multiple legal firms.[10] As this limited survey shows, the costs directly related to product liability actions are high.

Earlier studies also have pointed out the inefficiency of the present system. A 1986 Rand Institute for Civil Justice study, which showed that the annual overall transaction costs of the U.S. tort system exceed compensation to plaintiffs. The Rand study found that in 1985, net compensation totaled $13 to $15 billion, but the transaction costs—including plaintiff's attorney's fees, defense

---

[1] Testimony of the Honorable Robert A. Mosbacher, Secretary, U.S. Department of Commerce, Before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, on April 5, 1990 [hereinafter April 5, 1990 hearing].

[2] Statement of Howard H. Fark, Senior Vice President, Minster Machine Company, Before the Consumer Subcommittee on the Senate Committee on Commerce, Science, and Transportation, February 22, 1990 at 2 [hereinafter February 22, 1990 hearing].

[3] *See, e.g.*, Speech to the American Law Institute by Chief Justice of the United States Warren E. Burger, May 13, 1986.

[4] U.S. Department of Commerce, Bureau of the Census, *1990 Statistical Abstract of the U.S.*, Chart No. 314, p. 184 (110th ed. 1990).

[5] *Id.*

[6] U.S. General Accounting Office; Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness; Committee on Energy and Commerce, House of Representatives, *Product Liability: Verdicts and Case Resolution in Five States*, at 25 (Sept. 1989) [hereinafter GAO Report].

[7] *Id.* at 29.

[8] *Id.*

[9] *Id.* at 52-53

[10] *Id.* at 54.

legal fees, public expenditures, and the time of the litigants—were between $15 billion and $19 billion.[11]

The pattern that the Rand study found in the tort system as a whole is repeated in product liability cases, alone. According to calculations derived from a comprehensive 1977 survey of 24,452 closed claims conducted by the Insurance Service Office (ISO), for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs.[12] Moreover, for every dollar awarded to a claimant, he or she typically pays a contingent fee of 33 cents in legal costs and therefore receives about 67 cents. Thus, on this basis (adding the average defense cost to the contingent fee) one can estimate that the product liability tort litigation system appears to cost more in litigation and transaction costs than the net recovery received by the claimant.

Not only do these transaction costs exceed compensation, but they have risen dramatically in recent years. According to a 1986 study by economists at New York University, the tort system's administrative or transaction cost—the amount spent to adjust and litigate claims made by injured parties—has been raising rapidly since 1983.[13] This study noted:

> These increases portend trouble ahead if they are not checked. If current rates of growth continue, we can expect that by 1990 we will be spending between $31 and $38 billion per year simply administering the tort system.[14]

The mounting costs from this inefficient system have exceeded the projections made in the 1986 New York University study. According to a 1989 study, conducted by the insurance industry, the U.S. tort system is the most costly tort system in the free world.[15] This study estimates the current overall cost of the U.S. tort system at a staggering $117 billion,[16] an amount almost triple the figure projected in 1986.

Liability insurance costs rise as transactions costs rise. According to a May 1986 ISO report, "The Rising Costs of General Liability Legal Defense," the total legal defense expenses incurred in 1984 in general liability cases, including product liability cases, were $2.7 billion, and the proportion of general liability costs incurred by in-

---

[11] Testimony of James S. Kakalik, Ph.D., The Institute for Civil Justice of the Rand Corporation, before the Subcommittee on Trade, Productivity, and Economic Growth of the Joint Economic Committee, July 29, 1986, S. Hrg. 99-1090. The same conclusion was reached in a study done by an actuarial consulting firm for members of the insurance industry. The study found that in 1984, 63 percent of the gross insured costs of the United States tort system consisted of payments to claimants. Robert W. Sturgis, "The Cost of the U.S. Tort System," Tillinghast, Nelson, and Warren, Inc. (November, 1985) at 16. If this is reduced by one-third to account for plaintiffs' attorneys' fees, only 42 percent of the costs remain to compensate the injured. Dr. Kakalik, author of the Rand study, explained in his testimony that Sturgis' estimate of transaction costs "is higher than ours because it includes the cost of insurance premiums that cover claims, lawsuits, and the operation of the insurance system. We only report on compensation and costs directly associated with tort lawsuits."

[12] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results, 11 (1977).

[13] Andrew Schotter and Janusz Ordover, The Cost of the Tort System I, New York University, C.V. Starr Center for Applied Economics (March 1986). This study is described in James Nolan, "Liability Costs to Top US Deficit," Journal of Commerce, April 24, 1986, at 1.

[14] *Id.*

[15] Tillinghast Study, Perrins-Tower Group, *Tort Cost Trends: An International Perspective*, at 12 (Dec. 1989).

[16] Tillinghast, *supra* note 15, at A3.

surers that are consumed by legal defense costs almost tripled between 1960 and 1984.

During this period, as State courts expanded the scope of product liability laws and extended the situations in which product manufacturers were held strictly liable, product manufacturers have found themselves faced with enormous increases in liability insurance costs, with increases of as much as 1500 percent in some cases.[17]

Neither plaintiffs nor defendants benefit from the rapidly increasing and excessive costs of the present system for resolving product liability disputes. S. 1400 would take a number of steps to encourage resolution of these disputes in a less costly manner.

Delay.—A second problem with the present product liability system is delay. This is particularly a concern for seriously injured victims, who are often in desperate financial straits and must wait years to be compensated while litigation drags on.

One insurance industry survey has shown that 36 percent of bodily injury losses in product liability cases are not paid until at least 4 years after the first report, and that it takes 5 years to pay the claim with the average dollar amount of loss. This study also found that "larger claims tend to take much longer to close than smaller ones." [18]

Another insurance industry study found that the victims of the severest injuries have to wait the longest. This study found that in cases in which payment exceeded $100,000, 21.6 percent of claimants waited more than 5 years for payment. Only 2.1 percent were paid less than a year after they reported their injury, and 62.6 percent took more than 3 years to be paid.[19]

More recently, the 1989 GAO report found that in the five States studied, on average, product liability cases took two and one-half years to move from filing to trial court verdict.[20] One case studied by GAO took about nine and one-half years to move through the court system.[21]

Such delays plague even the many product liability cases that are settled before trail. One plaintiff's attorney has explained that even though most cases are settled, "most settlement negotiations get serious only a week or so bofore trial is scheduled to begin." The delay has become so ingrained in the system that "each week the [lawyer's] firm projects cash flow by estimating the settlement value of the cases set for trial the following week." [22]

Delay also can result in undercompensation of victims. Because many victims of injury—particularly those with the most severe injuries—have inadequate resources to pay for their medical and rehabilitation expenses, they are forced to settle for less than their full losses in order to get some payment because they cannot afford

---

[17] Priest, *The Current Insurance Crisis and Moden Tort Law*, 96 Yale L.J. 1521, 1527 (1987).

[18] Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results, 79–80 (1977).

[19] Alliance of American Insurers Survey of Large-Loss Product Liability Claims 4 (1980).

[20] GAO Report, *supra* note 6, at 49.

[21] *Id.*

[22] Wayne E. Green, *A Lawyer Faces Risks In Deciding to Take On Costly Damage Suits*, Wall St. J., May 23, 1986 at 12.

to wait longer without compensation.[23] Studies have shown that when rehabilitation has to be delayed, victims do not recover as fully as they do when the problem is treated promptly.[24]

S. 1400 uses two approaches to eliminate delays. These are incentives for parties to participate in Alternative Dispute Resolution (ADR) and negotiated settlements.

Inequitable Compensation.—Not only does the present product liability system generate excessive costs and delays; it is unable to compensate fairly injured victims in proportion to their losses. Numerous studies have found that the tort system grossly overpays people with small losses, while underpaying people with the most serious losses.

The 1977 ISO product liability study found that injured plaintiffs with losses between $1 and $1,000 receive, on the average, 859 percent of their losses, while those with losses of over $1 million receive, on the average, 15 percent of their losses (before paying their attorney's fees).[25] In general, the study found, compensation exceeded economic loss when losses were below $100,000, and then dropped dramatically below economic loss when the claimant's loss exceeded $100,000.[26]

A 1980 insurance industry study of the largest product liability claims confirmed that the most severely injured victims do not even receive full compensation for their pain and suffering. For every dollar of past and future economic loss, the tort system paid claimants $1.22, but if the standard 33 percent attorney's contingent fee is deducted, these claimants were left with only about 81 cents for every dollar of loss.[27]

Reform of the product liability system is essential to assure that those who are injured by defective products are fairly compensated in proportion to their losses.

Unpredictability.—Consumers, manufacturers, and product sellers are caught up in a product liability litigation system that often has been characterized as a legal lottery. It is a system in which identical cases can produce startlingly different results.[28]

As Professor Jeffrey O'Connell has explained in 1986 testimony before the Committee:

> If you are badly injured in our society by a product and you go to the highly skilled lawyer . . . in all honesty [the

---

[23] *See* O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 Calif. L. Rev. 898, 901-902 (1985), citing Corstevet, *The Uncompenstated Accident and Its Consequences*, 3 Law & Contemp. Probs, 466, 468 (1936).

[24] Statement of Leonard Bender, M.D., on behalf of the American Congress of Rehabilitation and the American Academy of Physical Medicine and Rehabilitiation, in Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings before the Subcommittee on Consumer Protection and Finance, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Serial No. 95-55, 594 (1977).

[25] Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results 49 (1977).

[26] *Id.* at 383.

[27] Alliance of American Insurers Survey of Large-Loss Product Liability Claims iii (August, 1980). This study almost certainly overestimates the compensation that injured victims are receiving; it only includes cases where payment exceeded $100,000 and thus does not average in cases where the claimant had large economic losses, but received less than $100,000—or nothing at all.

[28] Sugarman, *Doing Away with Tort Law* 73 Cal. L. Rev. 555, 594 (1985).

> lawyer] cannot tell you what you will be paid, when you will be paid, or indeed if you will be paid.[29]

The present system's uncertainty is a problem for both manufacturers and consumers injured by defective products. Defendants need greater certainty as to the scope of their liability under the law. Plaintiffs need faster, more certain recovery that fully compensates them for their real losses.

The inherent uncertainty of the system has been linked by commentators to the diversity of legal standards applied in different jurisdictions and the doctrinal mixture of contract and tort law applied in product liability cases.[30] In addition, it has been linked to expanding doctrines of liability,[31] the difficulties in establishing causation and fault, as well as the difficulties in translating nonpecuniary loss (pain and suffering) into pecuniary terms.[32]

The uncertainties and unpredictability of the system affect settlements as well as judgments. Settlement negotiations are "sabotaged" [33] by the lack of clear standards. With respect to punitive damage claims, for example, uncertainties about liability standards make it difficult for manufacturers to negotiate sensibly.[34]

Greater predictability and uniformity will benefit all parties in product liability disputes. Warren W. Eginton, a sitting Federal Judge, testified at the Subcommittee's February 22, 1990 hearing:

> [T]he more uniformity can be accomplished . . . the more quickly the litigation will flow and the lighter the economic burden on all parties involved. Certainly the task of the judge and juries in understanding the problems and the rules of law to be applied to those problems will be greatly simplified by uniformity.[35]

S. 1400 would attempt to reduce some of the unpredictability of the current system by taking steps, such as clarifying the responsibilities of product sellers, establishing uniform standards for punitive damage awards, and establishing uniform time limits for pursuing product liability claims.

The Present Product Liability System Places a Burden on Productivity and Commerce

The Committee's evaluation of the present product liability system is that it extracts high transaction costs from plaintiffs, defendants, consumers, and manufacturers. Valuable resources are wasted on fueling the product liability machinery that could be

---

[29] Testimony at Feb. 27, 1986 hearing before Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation.

[30] *See, e.g.,* S. Rept. 98-476, pp. 3-4 Guido Calabresi and Alvin K. Klevorick *Four Tests for Liability in Torts, 14 J. Leg. Stud. 585, 585-6 (1985).*

[31] *See, e.g.,* Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,* 14 J. Leg. Stud. 461, 521-7 (1985); Twerski, *A Moderate and Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution, 18 U. of Mich. J. of L. Reform 575, 580-599 (1985).*

[32] *See e.g.,* O'Connell, *Offers That Can't be Refused,* 77 Nw. U.L. Rev. 589, 590-591; McCormick, *Handbook on the Law of Damages, 318 (1935) p. 11.*

[33] Twerski, *A Moderate and Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution,* 18 U. Mich. J. of L. Ref. 575, 612 (1985).

[34] *See* Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution,* 18 U. of Mich. J. of L. Reform 575, 612 (1985).

[35] Statement of the Honorable Warren W. Eginton, U.S. District Judge, District of Connecticut, February 22, 1990 hearing at 5.

used to strengthen our economy. Moreover, those transaction costs are only a small part of the enormous burden this system puts on our economy. It deprives consumers of needed products, limits job opportunities, and weakens our competitive position in world markets. In his testimony before the Consumer Subcommittee, Secretary of Commerce Robert A. Mosbacher cited a Baylor University study, which found that in 1988 the current liability system cost the State of Texas alone over $8 billion and 79,000 jobs.[36]

The effects of our current system on the economy were clearly demonstrated in a 1988 survey of over 2,000 Chief Executive Officers (CEO's) which was conducted by the Conference Board. Participating businesses indicated that their actions were affected in the following ways by our current product liability system:

PERCENT OF FIRMS REPORTING ACTION

	Adverse impacts cited based on actual liability experience [37]	Adverse impacts cited based on anticipated liability problems [38]
Type of impact:		
Closed production plants	8	1
Laid off workers	15	1
Discontinued product lines	36	11
Decided against introducing new products	30	9
Decided against acquiring/merging	17	5
Discontinued product research	21	4
Moved production offshore	4	1
Lost market share	22	

[37] McQuire, The Conference Board, Research Report No. 908, "The Impact of Product Liability" (1988), Table 28, pg. 19 [hereinafter Conference Board Report].
[38] Conference Board Report, Table 29, pg. 19.

Secretary of Commerce Mosbacher testified that the Conference Board results show the extent of the indirect costs of the current product liability system. These indirect costs include "useful products . . . being discontinued, decisions not to develop new product lines or not to continue product research, and a fear to innovate." [39] Secretary Mosbacher expressed concern that: "Rational business planning is seriously affected by the uncertainty of the system. Just as alarming, 75 percent of the CEOs expect that the future impact of the product liability system on U.S. competitiveness will grow in significance." [40]

Product Innovation.—Testimony was received to the effect that the current product liability systems inhibits the bringing of new products to market in a number of ways. The expense of litigating claims diverts resources from productive efforts. Excessive management time is diverted from production to assessment of legal claims. Many U.S. companies devote far more to product liability costs than to research and development efforts. For example, the National Machine Tool Builders Association stated recently that its

[36] Statement of the Honorable Robert A. Mosbacher, Secretary, U.S. Department of Commerce, April 5, 1990 hearing at 9.
[39] Statement of the Honorable Robert A. Mosbacher, Secretary, U.S. Department of Commerce, April 5, 1990 hearing at 5.
[40] *Id.* at 4.

members spend seven times more on product liability costs than on research and development.[41]

Moreover, the current product liability system is having a "profoundly negative impact on the development of new medical technologies," according to a recent report by the American Medical Association.[42] The report concluded that:

> Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.[43]

The general aviation industry is another sector of the economy that has been adversely affected by the product liability system. In 1985, insurance premiums averaged $70,000 per airplane, despite the general aviation industry's best safety record in years. At the same time that these costs have increased, sales of new aircraft and jobs have plummeted. In 1979, more than 17,000 general aviation aircraft were sold by U.S. manufacturers. In 1989, such sales had dropped by over 90 percent to 1,535 airplanes. As a result, tens of thousands of workers have been laid off, and unemployment in the industry is now over 50 percent.[44]

Moreover, the uncertainties of the present system deter the development of new products and product improvements. One example of this problem is Monsanto's experience with a biodegradable phosphate fiber. Monsanto asserts that this substance could have been a safe substitute for asbestos. Monsanto decided, however, not to market the product due to fear of uncertain liability.[45]

At the May 10, 1990 Consumer Subcommittee hearing on S. 1400, this claim was challenged by a witness testifying in opposition to the bill.[46] The witness submitted documents suggesting that the results of the intrapleural implant study with Monsanto's calcium sodium metaphosphate fiber presented a substantial risk that pleural fibrosarcomas might develop. Monsanto responded to this charge with a document indicating that independent experts concluded that the results could not be used as the basis for judging the effect on humans.[47] Moreover, the witness stated in response to questioning that there was a subsequent test of the Monsanto fiber.[48] This test, a chronic inhalation study, has found no evidence of carcinogenicity.

---

[41] Statement of Howard H. Fark, February 22, 1990, at 2.

[42] Statement of Richard Kingham, at April 5, 1990 hearing, *citing*, AMA Board of Trustees, "Impact of Product Liability on the Development of New Medical Technologies," at 12 (June 1988) in *Brief of Amici Curiae* Pharmaceutical Manufacturer Association and American Medical Association in *Browning Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

[43] *Id.* at 1.

[44] The General Aviation Accident Liability Standards Act of 1989, S. 640, Senate Committee on Commerce, Science, and Transportation, 101st Congress, 1st Session, Rept. No. 101-223, 1-3 (1989). *See also* Statement of Robert Martin, Counsel, Beech Aircraft Corp., Witchita, Kansas, before the Senate Judiciary Committee, March 9, 1990.

[45] Letter testimony of Monsanto Company, May 10, 1990 hearing.

[46] Testimony of Linda Lipsen, Consumers Union, May 10, 1990 hearing.

[47] Letter testimony of Monsanto Company, May 10, 1990 hearing.

[48] Testimony of Linda Lipsen, Consumers Union, May 10, 1990 hearing.

Actual product development is not the only casualty of the product liability system. Dr. Malcolm Skolnick testified at the April 5, 1990 consumer Subcommittee hearing as follows: "Scientific inquiry is stifled. Ideas in areas where litigation has occurred will not receive support for exploration and development. Producers fearful of possible suit will discourage additional investigation which can be used against them in future claims." [49] Secretary Mosbacher shared a related concern at the April 5, 1990 Subcommittee hearing: "Universities are shying away from licensing patents to small manufacturers because of their fear that, as the originators of the idea upon which a product was manufactured, they will become the 'deep pocket' if there is litigation involving the product." [50] Thus, considerable testimony was received that the uncertainty of the product liability system is a deterrent to the research and scientific investigation necessary to develop ideas that ultimately become innovative products.

U.S. Competitiveness.—The adverse effects of the product liability system have carried over into international trade. American manufacturers and product sellers generally pay product liability insurance rates which are 20 to 50 times higher than those of foreign competitors.[51] This disparity is attributable in large part to the uncertainties and costs of the American tort litigation system.[52] As a result of this disparity, American manufacturers and product sellers may be at a competitive disadvantage in both foreign and domestic markets. Insurers generally do not discount premiums where a manufacturer exports its goods, because there is always the possibility that a product-related suit will be brought in the United States. Thus, each U.S. product shipped abroad contains an insurance cost element greater than that of a foreign competitor.[53] With respect to domestic markets, the effect of the current uncertainties in product liability law is similar. For example, according to the National Machine Tool Builders Association, the price of imported products can be lower if imports sell only partially in the United States because product liability insurance rates for those products could be lower.[54]

The Limitations of State Efforts at Reform

In 1978, the Federal Interagency Task Force on Product Liability, after conducting an 18-month study of the problem, issued a report which suggested that a model product liability act be drafted with the idea that reforms of the system would be enacted at the Federal level if the States did not enact the model law.[55] A final

---

[49] Testimony of Dr. Malcolm Skolnick, April 5, 1990 hearing.

[50] Statement of the Honorable Robert A. Mosbacher, April 5, 1990 hearing at 9.

[51] The Conference Board Research Report at 4 (citing a 1984 study commissioned by the Department of Commerce).

[52] *Id.*

[53] *See* Orban, *Product Liability and International Trade and Policies,* Product Liability and Tort Law Reform, National Legal Center for the Public Interest, 144 (April 21, 1982).

[54] Letters from James A. Gray, President, National Machine Tool Builders Association, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office of Management and Budget (June 14, 1982). The letter also points out the effect of the lack of a statute of repose on this industry. NMTBA indicates there are cases in which 50 year old products have been the subject of product liability lawsuits.

[55] 43 Fed. Reg. 14612 (April 6, 1978).

version of this model law, known as the Uniform Product Liability Act (UPLA), was published on October 31, 1979.[56]

However, UPLA, which ultimately was offered as a model State law, has not been adopted in full in any State. Over 30 States have enacted specific product liability and general tort reform measures.[57] The States' efforts have been helpful and are to be encouraged; however, those efforts at State law reform have not resolved the overall problems of the product liability tort litigation system. Most State statutes are not comprehensive and fail to address all the key issues that arise in product liability litigation. Even if an individual State adopted a comprehensive product liability statute so that its own law was clear and predictable, the legal rules still would vary from State to State.

Individual States cannot address the problems of the product laibility system effectively, because reform within one State does little to resolve the tort litigation problems facing those who deal in an interstate market. Products are manufactured, sold, used, and insured in a nationwide market. Data show that most products manufactured in a given State are consumed or used outside that State.[58] As a result, manufacturers and product sellers may be involved in product liability actions governed by the law of any State in which they do business. An attempt by any one State to reform the system cannot relieve the overall burden imposed on interstate commerce.[59] In New York State, the Governor's Advisory Commission on Liability Insurance recently reached the same conclusion:

> Though we are stout defenders of state prerogatives in any area where the context permits at least minimally efficient state governance, we do not believe that product liability any longer falls into that category. The interpenetration of markets, the speed of movement of goods and money, the increasing, demanding, test of international competition all militate against a system which subjects product makers and sellers to a patchwork of 50 different sets of liability rules. In today's commercial world, such a system, far from permitting states like New York to impose rigorous and effective standards, simply shifts the balance of governmental influence in the direction of other states with different standards, were the same type of action can often be brought against the same defendant with quite a different potential outcome. Though we feel that product liability is unique among

---

[56] 44 Fed. Reg. 62714 (October 31, 1978).

[57] Statement of Alfred W. Cortese, May 10, 1990 hearing at notes 35-39 and accompanying text.

[58] Statement of the Honorable Wendell L. Wilkie II, General Counsel, U.S. Department of Commerce, February 22, 1990 hearing, at 10. It has been estimated that 30.5 percent of manufactured goods are consumed in the manufacturing state. *See*, 1977 Census of Transportation, Commodity Transportation Survey, Summary, U.S. Dept. of Commerce, Bureau of the Census, 1-77 (1981); American Bar Assoc. Section of Corporation, Banking and Business Law, Report to the House of Delegates, Attachment D. (1982). *See generally* Statement of Randolph J. Stayin on behalf of the American Textile Machinery Association, Product Liability Act: Hearing before the Subcommittee on Consumer of the Senate Committee on Commerce, Science, and Transportation, 99th Cong., 1st Sess., Rept. No. 99-84, 170 (1985).

[59] Several State governors have recognized this in vetoing proposed product liability legislation. *See e.g.*, Schwartz and Bares, *Federal Reform of Product Liability Law: A Solution That Will Work*, 13 Cap. U. L. Rev. 351, 355 (1984).

areas of tort law in this respect, we do believe that in this single case the case for federal intervention is compelling.[60]

The enactment of product liability reform is within Congress' power to regulate interstate commerce.[61] There are numerous examples of Federal legislation in areas where diverse State laws were deemed a burden on interstate commerce.[62] The fact that product liability law is traditionally an area of State law does not alter the fact that Federal legislation in this area, under the Commerce and Supremacy Clauses, can preempt State law to relieve the enormous burden imposed by the product liability system on American commerce.[63]

The question is not about Congress' power to enact reform, but whether it should exercise this power. The Committee believes a strong case has been made that Congress must exercise its power to reform an inefficient system that is a burden to the national economy and to our global competitiveness. As the Department of Commerce (DOC) has stated, problems of a national scope with international implications require Federal solutions.[64] Much of existing product liability law has been fashioned by the courts.[65] However, it is the responsibility of the Congress to deal with the broad policy implications of inconsistent State product liability laws on manufacturers, product sellers, and consumers.

Federal Leadership on Product Liability Reform

S. 1400 is the culmination of 15 years of effort to develop a national approach to this issue.

In the mid-1970's, product liability was first recognized as a serious problem of interstate commerce, which, in the view of many businesses and academic observers, had reached "crisis" proportions and required a federal response. This recognition came as a result of an increase in product liability claims and litigation and an increase in product liability insurance premiums.

The Federal Government responded to these concerns in 1976 by creating a Federal Interagency Task Force on Product Liability to examine the product liability problem. The task force, chaired by DOC, conducted an 18-month study which culminated in a series of reports confirming the legitimacy of the business community's con-

---

[60] New York State Governor's Advisory Commission on Liability Insurance, Insuring Our Future, Vol. II, 113 (July 1, 1986).

[61] U.S. Const., Art. I, sec. 8, cl. 3.

[62] Congress preempted state tort reform to promote the nuclear power industry. *See Duke Power Co.* v. *Carolina Environmental Study Group*, 439 U.S. 59 (1978). *See also* Public Utility Holding Company Act of 1935, 15 U.S.C. sec. 79 et seq. (activities involved "not susceptible of effective control by any State"); United States Cotton Standards Act, 7 U.S.C. sec. 51 et seq. (uniform national classifications necessary to protect and promote commerce); Cigarette Labeling and Advertising Act, 15 U.S.C. sec. 1331 et seq. (national standards essential in order that "commerce and the national economy . . . not (be) impeded by diverse, nonuniform regulations"); Federal Employers' Liability Act, 45 U.S.C. 51 et seq.

[63] U.S. Const., Art. VI, cl. 2.

[64] Statement of the Honorable Wendell L. Willkie, II, February 22, 1990 hearing at 10.

[65] *See* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1535 (1987); *see also Escola* v. *Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (en banc) (Traynor, J., concurring); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

cerns.[66] There was substantial evidence that the cost of product liability insurance had increased dramatically in the early mid-1970's and evidence that the number of product liability actions had increased.[67]

In 1978, DOC formed a second Task Force on Product Liability and Accident Compensation. This new task force developed an options paper outlining what action, if any, the Federal Government should take to address the causes of the product liability problem. The paper found that "the 'hodge-podge' of rules in each of the 50 states makes it almost impossible to set [insurance] rates with any degree of confidence," and recommended that a model product liability law be drafted for implementation at the Federal or State level.[68]

In October 1985, similar concerns prompted the Attorney General to establish the Tort Policy Working Group, an inter-agency working group consisting of representatives of ten agencies and the White House. This group issued the Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability. This report recommended a number of tort law reforms applicable to product liability cases. Subsequently, the Administration drafted Federal product liability legislation based on the recommendations contained in this report.

During the 101st Congress, Vice President Dan Quayle, Chairman of the President's Council on Competitiveness, has established Federal product liability reform as a top legislative priority. Vice President Quayle describes the problem as a "lawyer's tax" which results in higher prices, reduced consumer choice, lost products and jobs.[69] President George Bush expressed his support for such legislation in his January 31, 1990 State of the Union Address.

The Administration subsequently has expressed its strong support for the reform package contained in S. 1400. Secretary of Commerce Mosbacher expanded on the Administration's support for S. 1400 in his testimony before the Consumer Subcommittee on April 5. He cited the effect of the current product liability system on the development of new products and its detrimental effect on the competitive position of domestic manufacturers. Secretary Mosbacher concluded that product liability reform is an important aspect of an overall program to enhance domestic competitiveness in world markets.[70]

Legislative History

Senator Kasten introduced S. 1400 on July 25, 1989. There are 28 consponsors of the bill, including 10 members of the Committee. The Consumer Subcommittee held hearings on the issue of Federal product liability reform and S. 1400 on February 22, April 5, and

---

[66] *E.g.*, Final Report of the Task Force on Product Liability, 1 vol. (May 1977); Legal Study, 7 vols. (March 1977); Insurance Study, 1 vol. (March 1977); Industry Study, 2 vols. (April 1977).

[67] Final Report of the Task Force on Product Liability at I-26 (May 1977).

[68] Options Paper on Product Liability, 43 Fed. Reg. 14612, 14624 (April 6, 1978).

[69] Now Is the Time for Product Liability Reform, Vice President Dan Quayle, *Product Safety & Liability Reporter*, The Bureau of National Affairs, Inc., Vol. 18, No. 12, March 23, 1990 at 307.

[70] Statement of the Honorable Robert A. Mosbacher, April 5, 1990, hearing at 9.

May 10, 1990. On May 22, in open executive session the Committee favorably reported an amendment in the nature of a substitute to S. 1400 by a rollcall vote of 13 to 7. This substitute incorporated only technical changes from the original text of S. 1400.

Prior to this Congress, the Committee already had a long history of involvement with product liability reform and reported three other bills on the subject, which were introduced by Senator Kasten. S. 2631 was reported by the Committee in the 97th Congress (S. Rept. 97-670), and S. 44 was reported by the Committee in the 98th Congress (S. Rept. 98-476). Congress adjourned without Senate action on either of these measures.

At the beginning of the 99th Congress, on January 3, 1985, Senator Kasten introduced S. 100, the Product Liability Act. This bill would have preempted State law to impose uniform Federal rules and standards of liability governing the recovery of damages for injuries caused by defective products. This bill was substantially the same as S. 44, which had been reported by the Committee during the 98th Congress.

A Consumer Subcommittee on S. 100 was held on March 21, 1985 (Serial No. 99-84), and the bill was considered by the Committee at an executive session on May 16, 1985. At that session, a motion to report the bill was defeated by an 8-8 vote.

Prior to the May 16, 1985 executive session, two amendments in the nature of a substitute to S. 100 had been introduced. One of these amendments (S. Amdt. No. 16) was introduced by Senator Dodd on March 19, 1985, and the other (S. Amdt. No. 100) was introduced by Senator Gorton on May 14, 1985. These amendments were complete substitutes for S. 100 that preempted certain aspects of State law and also would have established alternative expedited claim systems for limited recovery of damages in product liability cases. Hearings on these amendments were held by the Consumer Subcommittee on June 18 and June 25, 1985 (Serial No. 99-177).

After these hearings, the Committee staff was instructed by the then Chairman of the Commerce Committee, Senator Danforth, to draft a proposal that combined elements of all these measures. The first draft was released for public comment on July 15, 1985. After review of the extensive comments received from the public, a second draft was released on November 20, 1985. This draft was formally introduced by Senator Danforth on December 20, 1985, as S. 1999. This bill, which was cosponsored by Senators Dodd and Kassebaum, was the subject of two days of hearings before the Consumer Subcommittee on February 27 and March 11, 1986.

On April 30, 1986, Senator Kasten introduced an amendment in the nature of a substitute for S. 100 (S. Amdt. No. 1814).[71] This amendment embodied recommendations for product liability reform that had been made by the Administration's Tort Policy Working Group.[72]

On May 12, 1986, Senator Danforth introduced an amendment in the nature of a substitute for S. 1999 (S. Amdt. No. 1951).[73] This

---

[71] 132 Cong. Rec. S5106.

[72] Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February 1986).

[73] 132 Cong. Rec. S5874.

amendment, which was cosponsored by Senator Dodd, replaced the expedited claim system of S. 1999 with an expired settlement system and made a number of other changes in S. 1999. On May 1986, Senator Gorton introduced an amendment in the nature of a substitute for Senator Danforth's amendment (S. Amdt. No. 1968).[74] On May 19 and 20, 1986, the Consumer Subcommittee held hearings on Senator Kasten's amendment, Senator Danforth's amendment, and the other product liability measures before the Committee.

On June 3, 1986, the Committee began its markup of product liability legislation. The markup bill was an original bill that embodied the provisions of Senator Danforth's amendment to S. 1999. On June 12, the Committee adopted an amendment in the nature of a substitute for the original markup bill. The amendment contained product liability reform provisions that had been agreed to by Senators Danforth, Gorton, and Kasten as a "core package" of product liability reforms. On June 12, 19, 24, 25, and 26, 1986, the Committee continued its consideration of this core package and added a number of other amendments before reporting s. 2760, as an original bill. S. 2760 came before the full Senate on September 17, 1986. On September 25, the Senate agreed to the motion to proceed to S. 2760 by a vote of 84 to 13. The bill was returned to the Senate Calendar, and no further action was taken.

The primary activity on Federal product liability legislation in the 100th Congress occurred in the House of Representatives. On February 18, 1987, Congressmen Richardson and Luken introduced H.R. 1115, which was referred to the House Energy and Commerce Committee. The Subcommittee on Commerce, Consumer Protection and Competitiveness held hearings on the need for federal product liability reform and on specific issues in the bill on May 5, May 20, June 18, July 21, August 6, October 7, and December 17, 1987. The subcommittee met to mark up the bill on November 18, 19, and 20, and December 3 and 8, 1987. H.R. 1115 was reported by the subcommittee, as amended, on December 8, 1987, by a vote of 11-3. On May 10, 12, 18, 19, and 24, June 1, 2, 8, 9, and 14, 1988, the Full Energy and Commerce Committee met to mark up H.R. 1115, voting on June 14 to report H.R. 1115, as amended, favorably by a recorded vote of 30-12. H.R. 115 then was sequentially referred to the House Committees on the Judiciary and on Education and Labor. The Education and Labor Committee held a hearing on September 27, 1988, on provisions in H.R. 1115 that affected workplace safety. The House Judiciary Committee took no action on the bill in the 100th Congress. The sequential referral was in effect through the end of the session, and thus the 100th Congress adjourned without considering H.R. 1115 on the floor of the House.

Summary of Major Provisions

EXPEDITED SETTLEMENTS OF CLAIMS

Either party may offer to settle after a lawsuit is commenced. If the plaintiff offers to settle but the defendant refuses and then

---

[74] 132 Cong. Rec. S6232.

losses subsequent litigation, the defendant would be liable for the plaintiff's attorney's fees, in addition to damages awarded to the plaintiff for his injuries. Likewise, if the defendant offers to settle but the plaintiff refuses and the judgment is for an amount less than the settlement offer, the plaintiff woudl be liable for the defendant's attorney's fees. The plaintiff will not be liable for the defendant's attorney's fees in excess of the amount the plaintiff receives from collateral sources, such as insurance.

Either party may offer to participate in State ADR procedures. If a party refuses unreasonably to participate in an ADR procedure, the refusing party shall be liable for the offering party's reasonable attorney's fees.

RESPONSIBILITY OF PRODUCT SELLERS

In any product liability action, a product seller is liable if the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of the claimant's harm. Where, however, the manufacturer is not subject to service of process or is determined to be judgment-proof, the seller may be responsible for harms attributable to the manufacturer.

PUNITIVE DAMAGES

Punitive damages may be assessed if the claimant establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a conscious, fragrant indifference to the safety of persons who might be harmed by a product.

Punitive damages may not be imposed upon manufacturers or product sellers for harm caused by prescription and over-the-counter drugs, medical devices, and aircraft, when the safety of those products has been approved by the appropriate Federal agency prior to the marketing of the product. This defense is not available, however, to any defendant who has withheld or misrepresented relevant information during the approval process. This defense also is not available when the certification was achieved as a result of a bribe or illegal payment.

UNIFORM TIME LIMITATIONS ON LIABILITY

A 2-year statute of limitations for filing complaints in all product liability actions is provided, which does not begin to run until the claimant discovers or should have discovered both the claimant's harm and its cause. This "discovery rule" is more favorable to claimants than the "time of injury rule" followed by some States.

If a product is a capital good, no claim may be brought for harm caused by the product more than 25 years after delivery to the first buyer or lessee not engaged in the business of selling or leasing the product. "Capital good" is defined as a product used in trade or business or held for the production of income. This 25-year statute of repose for capital goods applies only when the claimant is entitled to receive work compensation benefits and if the harm alleged by the claimant is not a toxic harm.

WORKERS' COMPENSATION OFFSET

Damages in a product liability action shall be reduced by the amount paid to the claimant under any State or Federal worker's compensation law. An employer's right to recapture worker's compensation benefits from a product liability award is eliminated unless the employer can prove that the employer and other employees were in no way responsible for the employee's injuries. A manufacturer is prohibited from suing an employer for the employer's contribution to the product liability award, unless the employer attempts to assert a subrogation lien.

DEFENSE INVOLVING INTOXICATING ALCOHOL OR DRUGS

No plaintiff may recover for harm caused by a product if the claimant was under the influence of alcohol or any drug and such condition was more than 50 percent responsible for the claimant's harm. Determination of whether a person was under the influence of alcohol shall be made pursuant to applicable State law.

SEVERAL LIABILITY FOR NONECONOMIC DAMAGES

In any product liability action with more than one defendant, each defendant's liability for noneconomic damages shall be limited to the defendant's percentage of responsibility as determined by the trier of fact. This provision addresses the so-called "deep-pocket" problem, which could make even a minimally responsible defendant fully liable, under the doctrine of joint and several liability, for the claimant's entire damage award.

ESTIMATED COSTS

The cost impacts of the bill are summarized in the Congressional Budget Office cost estimate below, submitted in accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974. The Committee believes that this cost estimate should be viewed in the following context.

Section 305(d) of the bill would prevent, in some instances, an "employer" (or its workers' compensation insurer, if any) from pursuing a subrogation lien against a manufacturer or product seller to recover the workers' compensation benefits paid to the employer's injured worker. The term "employer" would include the Federal Government, because the bill does apply to the Federal Employees Compensation Act (FECA).

As a consequence, the Federal Government's workers' compensation program, established under FECA, would, in some instances, be prohibited from seeking to recover FECA benefits paid to a Government employee injured in a product-related workplace accident. The Federal Government could, however, seek recovery of FECA payments in those instances in which it could show a claimant's harm was in no way caused by it or one of the claimant's coworkers. In addition, the Federal Government could continue to seek subrogation recoveries in workplace accidents in which no product was involved. For example, if a postal worker was injured in an automobile accident or bitten by a homeowner's dog in the course

of the postal worker's delivery rounds, FECA could seek to recover the benefits paid to the injured worker from the insurer of the non-government vehicle or the homeowner's liability insurer.

Moreover, the loss of such FECA subrogation rights must be considered in the context of the Supreme Court's decision in *Lockheed Aircraft Corp.* v. *United States* 460 U.S. 190 (1983). In this case, the Supreme Court ruled that FECA's exclusive liability provision did not bar manufacturers' indemnity claims against the Federal Government under the Federal Tort Claims Act; if the applicable State law permits manufacturers to bring indemnity claims against employers, such claims are not barred by FECA.

Section 305(e) of the bill would limit the ability of product manufacturers and sellers who have been forced to pay damages in product liability actions to maintain an action for implied indemnity or contribution from an employer, when the injured person is entitled to workers' compensation benefits under State or Federal law. This provision would bar in those product liability actions the third-party recovery from the Federal Government permitted by the *Lockheed Aircraft* decision where no right of subrogation, contribution, or implied indemnity is asserted against the manufacturer or product seller.

The Congressional Budget Office notes that this provision would result in some savings for the Federal Government, but has been unable to assess fully the extent to which such savings would offset the loss of subrogation recoveries. According to the Justice Department's Civil Division, approximately 100 suits against the Federal Government by third-party product liability defendants are pending. The amount of recovery being sought has not been estimated, but it is anticipated that the savings produced by section 305(e) could be substantial and that this provision could significantly limit the liability of the Federal Government in future litigation.

The cost estimate of the Congressional Budget Office is as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 6, 1990.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1400, the Product Liability Reform Act, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, May 22, 1990. S. 1400 could result in a small cost or savings to the federal government, but CBO does not have sufficient information to estimate the amount of the budget impact.

S. 1400 would establish a federal product liability law. The bill defines certain responsibilities of manufacturers and product sellers and establishes an expedited procedure for settling product liability disputes. In cases where S. 1400 establishes a rule of law on an issue, it would preempt state laws on product liability. The bill would set uniform standards of product seller liability and for punitive damage awards and establish incentives for plaintiffs and defendants to avoid trial. The bill also keeps the workers' compensa-

tion system and the tort liability system somewhat separate in cases involving both work injury and product liability by restricting:

suits by an employer or its insurance carrier against a manufacturer or product seller to recoup funds paid in workers' compensation cases;

employers or insurance carrier liens against claimants' recoveries; and

recoveries by third parties against negligent employers for monies paid in product liability judgments.

S. 1400 could increase certain costs to the federal government in its role as an employer. This would occur because the bill would restrict suits by an employer or its insurance carrier against a manufacturer or product seller to recoup funds paid in workers' compensation cases, and because it would restrict employer or insurance carrier liens against claimants' recoveries. A Labor Department review of the Federal Employees Compensation Act (FECA) claims over the past five years showed that about $9 million annually was recovered by the federal government through actions brought by injured federal workers against third parties. Some portion of this amount would be lost to the federal government, because under this bill, the government would be restricted in such recoveries. However, there is no basis for determining how much of this $9 million a year would be lost, since the federal government could continue to recoup funds in cases where no product was involved, and in those product liability cases where the federal government was not at fault. Because the recovery of such damages directly offsets FECA obligations, their loss would result in an increase in budget authority and outlays in an amount less than $9 million annually.

The bill also could result in some savings to the government, because it would limit the ability of product manufacturers and sellers who have been forced to pay damages to injured federal workers in product liability actions to sue the federal government as an employer. Until 1983, the federal government successfully argued that FECA's exclusive liability provision protected it from such actions. However, in *Lockheed Aircraft Corporation* v. *the United States,* 103 S.Ct. 1033 (1983), it was held that FECA's exclusive liability provision did not bar third-party liability defendants from pursuing indemnity actions against the United States as an employer. CBO is not able to estimate the potential savings to the federal government that could be realized as a result of this provision of the bill.

The provisions in S. 1400 regarding workers' compensation actions would affect the budgets of state and local governments in much the same way as they affect the federal budget. However, CBO does not have sufficient information to estimate any such budget impact.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mitchell Rosenfeld and

Cory Leach, who can be reached at 226-2860 and 226-2820, respectively.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS AFFECTED

The purpose of this product liability reform legislation, as reported, is to provide greater certainty as to the rights and responsibilities of all those involved in product liability disputes, to reduce transaction costs, and to relieve the burden imposed on interstate commerce by the present product liability litigation system. It is anticipated that it will affect the conduct of those involved in product liability disputes by making a number of significant changes in the law that are applicable to all product liability actions. This legislation does not change the jurisdiction of State or Federal courts. Thus, the number of persons covered should be consistent with current levels.

ECONOMIC IMPACT

It is anticipated that this legislation will result in substantial cost and paperwork savings to all parties affected by product liability lawsuits. First, the legislation will bring greater predictability to this area of the law, and, thus, save time and money for manufacturers, product sellers, and consumers alike, each of whom will be able to determine their rights more readily than under current law. Moreover, the provisions of this legislation will promote early settlement of product liability disputes, thus reducing the enormous costs of product liability litigation, which are ultimately passed on to the consumer. It should also foster product innovation and enhance the competitive position of U.S. product manufacturers in world markets.

PRIVACY

S. 1400 will have no adverse impact on the personal privacy of the individuals or businesses affected.

PAPERWORK

S. 1400 creates no new regulations and imposes no additional regulatory requirements at either the State or Federal level. The legislation will not change the jurisdiction of State or Federal courts.

SECTION-BY-SECTION ANALYSIS

SECTION 101—SHORT TITLE

As Reported

Section 101 states the short title of the legislation, providing that the legislation may be cited as the "Product Liability Reform Act."

SECTION 102—DEFINITIONS

In General

Section 102 defines terms or phrases used in the bill. Whenever a defined term or phrase is used, reference should be made to the definition in section 102.

As Reported

Section 102 defines the following terms:

(1) *Claimant.*[75]—As used in the bill, a "claimant" is any person who brings a product liability action and any person on whose behalf such an action is brought. If such an action is brought through or on behalf of an estate, the term includes the claimant's decedent. If a product liability action is brought through or on behalf of a minor or incompetent, a claimant includes the minor's or incompetent's parent or guardian.

(2) *Clear and convincing evidence.*—The bill adopts the generally accepted definition of clear and convincing evidence.[76] This is a degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of allegations sought to be established. The clear and convincing evidence standard requires more proof than the preponderance of the evidence standard and less proof than the beyond a reasonable doubt standard.

(3) *Collateral benefits.*—This term includes all benefits and advantages received or entitled to be received by any claimant harmed by a product, under any Federal or State law (other than through a claim for breach of an obligation of duty), or any life, health, or accident insurance or salary continuation plan. The term also applies to such other benefits as disability income or replacement services insurance payments, or any benefit received or to be received as a result of participation in any pre-paid medical plan or Health Maintenance Organization.

Collateral benefits include all such benefits regardless of any right any other person has or is entitled to assert for recoupment through subrogation, trust agreement, lien, or otherwise.

(4) *Commerce.*—This definition covers the full extent of commerce.[77]

(5) *Commercial loss.*—This term applies to economic injury, whether direct, incidental, or consequential, including property damage and damage to the product itself, incurred by persons regu-

---

[75] The bill does not alter, modify, change, or preempt State laws governing who may be a "claimant." For example, state statutes stating who may bring a wrongful death or survival action are not affected by the bill. Such persons, if authorized by State law to bring the action, are "claimants" under the bill.

[76] *See, Hobson v. Eaton,* 399 F. 2d 781 (6th Cir. 1968), cert. denied 394 U.S. 928 (1969). *See also* 30 Am.Jur.2d Evidence Sec. 1167 (1967).

[77] *See, e.g., Wickard v Filburn,* 317 U.S. 111 (1942); *Perez v. United States,* 402 U.S. 146 (1971).

larly engaged in business activities consisting of providing goods and services for compensation. A civil action for commercial loss is not subject to this bill and is to be governed by applicable commercial or contract law.

(6) *Economic loss.*—This term means any pecuniary loss resulting from harm, which is allowed under State law. The essential distinction between economic and noneconomic loss is that the amount of the plaintiff's economic loss is subject to empirical measurement and confirmation. In contrast, there is no objective standard for measuring a plaintiff's pain and suffering.[78]

(7) *Exercise of reasonable care.*—The definition is based directly on section 283 of the Restatement (Second) of Torts and the accompanying comments, which refer to the "reasonable man" standard. The "reasonable man" denotes a "person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interest of others." [79]

(8) *Harm.*—The bill provides that a claimant may bring a civil action, for "harm" caused by a product, against the product's manufacturer or product seller. Harm is limited to injury or damage recognized under applicable State law, and does not include loss or damage caused to a product itself or commercial loss. Therefore, damage to the product itself or commercial loss is not a compensable harm under the bill.

Damage to the product itself traditionally has been left to commercial or contract law, under which a purchaser has a right of action for out-of-pocket losses relating to the value of a product.[80] In addition, indirect economic losses caused by damage to the product itself, i.e., commercial losses, are not compensable harms under the bill. Indirect economic losses include, for example, loss of profits due to an inability to use the damaged product. Under the majority case law which follows *Seely* v. *White Motor Company* [81] and the Supreme Court's decision in *East River Steamship Corp.* v. *Transamerica Delaval, Inc.*,[82] (admiralty case), recovery for such losses is left to commercial law and the Uniform Commercial Code. These losses are, in essence, contract damages and not tort damages.[83] They arise in the course of commercial dealings and can be resolved through contracts and claims based on those contracts.

Such claims for direct or indirect economic loss are not claims for "harm" caused by a product. Under the Uniform Commercial Code and other contract law, recovery is available for economic losses. It is the Committee's intent that where recovery is not allowed because of a State statute of limitations defense or other defenses to contract liability, this bill will not create an independent cause of action. For example a claim for commercial loss could not be brought under the Product Liability Reform Act if recovery

---

[78] McCormick, Handbook on the Law of Damages 318 (1935).

[79] Restatement (Second) of Torts, Sec. 283, comment b (1965).

[80] *The Baltimore Football Club, Inc.* v. *Lockheed Corp., 525 F.Supp. 1206* (N.D. GA. 1981); *Industrial Uniform Rental Co.* v. *Int'l Harvester Co.*, 463 A.2d 1085 (Pa. Super. 1983); *Noorman Mfg. Co.* v. *National Tank Co.*, 91 Ill. 2d 69, 435 N.E. 2d 443 (1982; *Superwood Corp.* v. *Siempelkamp Corp.* 311 N.W. 2d 159 (Minn. 1981).

[81] 63 Cal. 2d 9, 403 Pacific 2d 145, 45 Cal. Rptr. 17 (1965).

[82] 475 U.S. 856 (1980).

[83] *See* Note, *Economic Loss in Product Liability Jurisprudence*, 66 Colum. L. Rev. 927 (1966).

under State contract or commercial law is barred because of the statute of limitations, contractual disclaimers, or limitations of remedies. If the claim is for damage to the product itself or for commercial loss, a civil action cannot be brought under this legislation.

(9) *Manufacturer.*—A manufacturer means any person [84] engaged in a business to produce, create, make, or construct any product [85] (or component part of a product) and who designs or formulates the product (or component part of the product) or has engaged another person to design or formulate the product or component part. The term does not include a person who only designs or formulates a product—such as an architect or engineer. These persons, although not liable under S. 1400, may be liable under traditional tort law for failure to exercise reasonable skill and care in rendering their design services.[86]

A product seller [87] may be a "manufacturer" of the product the product seller sells or otherwise places in the stream of commerce in two situations. First, the product seller is a "manufacturer" of a product with respect to all aspects of the product that are created or affected by this product seller's own conduct in designing or formulating and producing, creating, making, or constructing an aspect of a product made by another. Where a product seller engaged in such conduct before placing the product in the stream of commerce, the product seller is responsible for the consequences of that conduct as if the product seller were a manufacturer.

For example, a company may manufacture a truck and deliver it to a product seller. Prior to selling that vehicle, the product seller may design and create what becomes a new aspect of the truck by, for example, adding a larger engine or a cabin unit. The product seller is, then, the manufacturer of the end product with respect to all aspects of the product that are affected or created by the addition; thus, the product seller is the manufacturer with respect to defects in the cabin unit itself and with respect to defects created by adding the unit to the original truck, such as lack of a warning back-up buzzer.[88] This rule fairly holds the product seller responsible for the consequences of the product seller's actions in designing and creating a new product from the original product; it is not intended to impose the manufacturer's liability on a product seller who merely cleans, paints, or reconditions the truck with parts that are designed or manufactured by someone else.

Second, a product seller is a manufacturer of a product where the product seller holds itself out as the manufacturer to the user of the product. Where a product seller attaches the product seller's own private label to a product made by another, the product seller's name and reputation become a representative of the product's quality in design and manufacture. The rule holding a product

---

[84] "Person" is defined in section 102(11).

[85] "Product" is defined in section 102(13).

[86] *E.g., Mechanical Rubber & Supply Co.* v. *Caterpillar Tractor Co.*, 80 Ill. App. 3d 262, 399 N.E. 2d 722 (1980). *See also New Mexico* v. *Gatham-Matotan Architects and Planners, Inc.*, 98 N.M. 740, 653 P. 2d 166 (1982).

[87] "Product seller" is defined in section 102(14).

[88] *See, e.g., Green* v. *City of Los Angeles*, 40 Cal. App. 3d 819, 115 Cal. Rptr. 685 (1974) (seller of crane liable for harm caused by defects in the crane created by the seller's modifications; given the modifications made by the seller, it was "tantamount to a manufacturer").

seller responsible for harms caused by products that the product seller "endorses" with the product seller's private label is uniformly followed by the States.[89]

(10) *Noneconomic loss.*—This means loss caused by a product other than economic loss or commercial loss.

(11) *Person.*—The bill uses a broad definition of the term "person," which includes individuals, corporations, companies, associations, firms, partnerships, societies, and any other entities.

(12) *Preponderance of the evidence.*—This standard of proof is that used most often in civil litigation. It is a degree of proof which leads the trier of fact to find that a fact is more probably either true or untrue.[90]

(13) *Product.*—As used in the bill, a product is any object, substance, mixture, or raw material in a gaseous, liquid, or solid state (A) which is capable of delivery itself or as an assembled whole, in a mixed or combined state or as a component part or ingredient; (B) which is produced for introduction into trade or commerce; (C) which has intrinsic economic value; and (D) which is intended for sale or lease. The term does not include human tissue, blood, and organs unless specifically recognized as a product pursuant to State law.[91]

(14) *Product Seller.*—A product seller is any person engaged in business to sell, distribute, lease, prepare, blend, package, label, or otherwise place a product into the stream of commerce, or who installs, repairs, or maintains the harm-causing aspect of a product. The definition includes anyone in the chain of distribution, such as a wholesaler, distributor, or retailer.

A seller of real property is not a product seller under this bill and, therefore, tort suits against a person who sells real property will be governed by State tort or real estate law.[92]

A person who provides professional services is not a product seller where the essence of the transaction is furnishing judgment, skill, or service and the sale or use of a product is only incidential. This follows the law of the majority of States.[93] Where, for example, an engineer, pharmacist, optician, or physician provides or uses product in connection with that person's professional services, the person is not a product seller.[94] The majority rule is that a pro-

---

[89] Restatement (Second) of Torts Section 400 (1965). *E.g., Smith* v. *Regina Mfg. Corp.*, 396 F. 2d 826 (4th Cir. 1968); *Carter* v. *Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103 (E.D. Pa. 1973); *Moody* v. *Sears, Roebuck & Co.*, 324 F. Supp. 844; (S.D. Ga. 1971).

[90] *See* 30 Am. Jr. 2d Evidence Section 1164 (1967); Cleary, McCormick on Evidence Section 339 (3d ed. 1984).

[91] Human tissue, blood, and organs are generally used pursuant to medical treatment. Claims for harms caused by these substances are, in the view of most courts, claims for negligently performed services. In the past, however, a few states have held that the law of product liability is applicable to harms caused by such substances, and this act does not prevent them from doing so. *See, e.g., Cunningham* v. *MacNeal Memorial Hospital*, 47 Ill. 2d 443, 226 N.E. 2d 897 (Sup. Ct. 1970) (overturned by Ill. Ann. Stat. Ch. 111 ½, sections 2 and 3). In those states which do not recognize such substances as products, the law with respect to such harms will not be changed. In States that do extend such recognition, suits for harm caused by such substances, which are brought under a theory of product liability would be governed by the provisions of this bill. *See generally Prod. Liab. Rep.* (CCH) Paragraph 1187.

[92] *E.g.*, Restatement (Second) of Torts Sections 353, 385 (1965) (providing standards of care for builders, contractors, and sellers of real estate).

[93] W. Prosser and W Keeton, Torts (5th ed.) 1984 at 719–20.

[94] *See., e.g., Carmichael* v. *Reitz*, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); *Bichler* v *Willing*, 58 App. Div. 2d 331, 397 N.Y.S.2d 57 (1977); *Barbee* v. *Rogers*, 425 S.W. 2d 342 (Tex. 1968); *Magrine* v. *Krasnica*, 94 N.J. Super. 228, 227 A. 2d 539 (1967), *aff'd* 100 N.J. Super. 223, 241 A 2d 637 (1968) , *aff'd* 53 N.J. 259, 250 A.2d 129 (1969).

fessional is required to exercise reasonable care, prudence, and skill in rendering services. Where failure to do so results in harm, injured persons have remedies under traditional State tort law theories and do not have a claim under this bill.

If, however, a professional engages in a commercial transaction where the essence of the transaction is not the furnishing of professional skill and judgment, the professional may be a product seller. For example, a pharmacist who sells perfume or photographic film may be a product seller within the scope of the bill. In such a case, the sale rather than the exercise of professional skill is the essence of the transaction.

A product lessor is not a product seller if (1) the product lessor acts only in a finacial role in the sale or distribution of the product, and (2) the product lessor has no control over the lease arrangement. Such a person, called a "financing lessor," generally has not contract with the product and does not provide advice about the product or its selection. Such a person merely provides the money to transfer the product to the lessee. The cases that have considered the issue uniformly hold that financing lessors are not product sellers.

(15) *State.*—This definition is broad and includes the District of Columbia, all the States, territories, and possessions of the United States, and any political subdivision thereof.

SECTION 103—PREEMPTION

In General

Section 103 provides that the bill governs any civil action brought against a manufacturer or product seller for harm caused by a product and that the bill supersedes State law to the extent that it establishes a rule of law applicable to recovery in such actions. When a rule of law is not established by the bill, the issue is left to applicable State law.

The law governing the liability of manufacturers of products, who routinely sell products across State lines, is presently governed by State law. The inefficiency and unpredictability of the law as it is presently administered has become a major burden on interstate commerce. The bill seeks to simplify the law and reduce the costs and unpredictability of the system.

Congress has the power under the Commerce Clause of the Constitution to enact a Federal product liability statute that preempts State law. "Any such legislation would offend neither the Tenth Amendment's recognition of state sovereignty . . . nor the Fifth Amendment's traditional notions of due process and equal protection." [95]

---

[95] Schmidt & Derman, *The Constitutionality of Federal Products Liability/Toxic Tort Legislation*, 6 J. Prod. Liab. 171, 184 (1983). *See also Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 93 (1978), where the Court held that preemption of state tort law in order to promote the nuclear power industry is permissible under the Commerce Clause and does not violate the Fifth Admendment. In the reaching this decision, the Court also rejected a challenge under the Equal Protection Clause.

As Reported

Section 103(a) states that this bill governs any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product. Consistent with the definition of "harm" set forth in section 102(a)(8), section 103 states that a civil action for loss or damage to the product itself or for commercial loss is not a product liability action subject to this bill, but is governed by applicable commercial or contract law. This follows traditional law, which leaves recovery for purely commercial losses to actions founded on commercial law.

Section 103(b) provides that the bill supersedes State law regarding recovery for harm caused by a product only to the extent that the bill establishes a rule of law applicable to an action for such recovery. Any issue arising in an action governed by this legislation that is not governed by a rule of law established by the legislation shall be governed by applicable State common and statutory law.[96]

As has been noted, the Commerce Clause of the Constitution [97] gives Congress the power to enact a uniform Federal product liability act.[98] The Supremacy Clause of the United States Constitution also gives Congress the power to enact a Federal law that replaces State law in the area of product liability.[99] The fact that tort law is traditionally a matter of State law does not alter this rule. Congress has enacted a number of statutes that preempt State tort law.[100]

Section 103(b) is intended to ensure that the rules set forth in the bill are uniformly applied in all product liability action, regardless of where the harm occurred and which court hears the claim. Under the Supremacy Clause, State courts are bound to apply Federal law,[101] and it is expected that State and Federal courts with jurisdiction over product liability actions will interpret the bill in a manner consistent with the intent of Congress.

However, section 103(b) also makes it clear that where the bill does not establish a rule of law, State law will apply. Recently, a number of State legislatures have considered the question of tort liability, including product liability, and some have adopted measures dealing with this matter. It is not the Committee's intention

---

[96] The effect of the bill on State law is the same as the effect, for example, of the Federal Employers' Liability Act on the law applied in actions involving injuries to railroad employees. 45 U.S.C. Sections 51 et seq. (1982). *E.g., Urie* v. *Thompson*, 337 U.S.C. 163, 174 (1949); *Brown* v. *Cedar Rapids and Iowa City Ry. Co.*, 650 F. 2d 159, 161 (8th Cir. 1981); *Isgett* v. *Seaboard Coast Line R. Co.*, 332 F. Supp. 1127 (D.S.C. 1971).

[97] U.S. Const. art. I, Section 8, cl. 3.

[98] The Commerce Clause power extends to interstate and intrastate activities which affect interstate commerce. *See e.g., Federal Energy Regulatory Comm'n* v. *Mississippi*, 456 U.S. 742 (1982) (discussion of scope of Commerce Clause); *Fry* v. *United States*, 421 U.S. 542 (1976); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

[99] U.S. Const. art. VI, cl. 2.

[100] *E.g.*, Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. Sections 901 et seq. (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C Section 2210 (limiting liability for nuclear power plant accidents); Federal Employers' Liability Act, 45 U.S.C., Sections 51 et seq. (governing the liability of interstate railway carriers to their employees and altering State tort law on available defenses).

[101] *Dice* v. *Akron, Canton & Youngstown R.R. Co*, 342 U.S. 359 (1952) (Federal Employers' Liability Act). In addition, when there is a variance between State and Federal law, "incompatible doctrines of local law must give way to principles of federal . . . law" *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95, 102 (1962) (National Labor Relations Act).

that this legislation preempt such State legislation—or any other rule of State law—that provides for defenses, places limitations on the amount of damages that may be recovered, or covers other topics that are not addressed by a rule in this bill. For example, the bill establishes certain rules of liability for product sellers. Those rules supersede State law. With respect to other issues regarding the liability of product sellers not covered by the bill, such as contributory versus comparative fault, State law applies.

Section 103(c) lists a number of laws that are not superseded or affected by the bill. The bill does not waive or affect the defense of sovereign immunity of any State or of the United States. The legislation does not affect any provisions of the Foreign Sovereign Immunities Act of 1976. Nothing in the bill shall be construed to supersede any Federal law except the Federal Employees Compensation Act.[102] The bill does not preempt State choice-of-law rules with respect to claims brought by a foreign nation or a foreign citizen.

Nor does the bill supersede any statutory or common law, including an action to abate a nuisance, that authorizes a State or person to institute an action for civil damages or civil penalties, clean-up costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief resulting from contamination or pollution of the environment, or the threat of such contamination or pollution. Such actions involve separate policy considerations and relate to acts that are different from the acts for which this bill provides rules of law. It is possible that the same event or conduct may give rise to both a product liability action governed by this bill and an action relating to contamination or pollution of the environment. The two types of actions could be alleged as separate counts in a single complaint and may or may not be alleged against the same defendant.

Section 103(d) provides that as used in this sedction, "environment" shall have the same meaning given to this term in section 101(8) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(8)).[103]

Section 103(e) requires that this bill be construed and applied after consideration of its legislative history to promote uniformity of law in the various jurisdictions.

SECTION 104—JURISDICTION OF FEDERAL COURTS

As Reported

Section 104 provides that the bill does not provide any new basis for Federal court jurisdiction. The resolution of product liability claims is left to State courts or to Federal courts that currently have jurisdiction over those claims.

---

[102] For example, the provisions of the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671 et seq. are not affected by the bill.

[103] This Act provides: " '[E]nviroment' means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinkinug water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."

Specifically, section 104 states: "The district courts of the United States shall not have jurisdiction over any civil action pursuant to this Act, based on section 1331 or 1337 of title 28, United States Code." These sections of the United States Code establish district court jurisdiction with respect to Federal questions and acts of Congress regulating commerce; it is the intent of the Committee that these sections shall not be a basis for bringing a product liability action governed by this bill in Federal court.

Civil actions governed by this bill will continue to be handled by State courts currently open to litigants and only by Federal district courts where there is currently a basis for Federal jurisdiction.[104] The bill does not affect these bases for jurisdiction and, therefore, does not expand the workload of the Federal courts.

SECTION 105—EFFECTIVE DATE

As Reported

Section 105(a) provides that the bill shall be effective on the date of its enactment and shall apply to all civil actions governed by the bill commenced on or after that date, including any action in which the harm or the conduct which caused the harm occurred before the effective date. Applying the statute to all claims filed after the effective date, regardless of when the harm occurred, allows all parties and courts to know precisely what law applies in a product liability action.

Section 105(b) provides that if any provision of the bill would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, bring an action within one year after the effective date of the legislation. This exception is intended to prevent unfair situations from arising as a result of the application of the time limitations set forth in section 304.

TITLE II

Title II of the bill establishes two schemes for expedited settlement of product liability claims in the initial stages of litigation. These schemes are based on incentives for settlement that will reduce the delays, excessive transaction costs, and uncertainties associated with such claims.

SECTION 201—EXPEDITED PRODUCT LIABILITY SETTLEMENTS

In General

Section 201 sets forth rules governing economic incentives for encouraging settlements based on Rule 68 of the Federal Rules of Civil Procedure. Either party may offer to settle. The claimant may include an offer of settlement with the complaint. The defendant may make an offer of settlement within the time permitted for responsive pleadings or 60 days after the service of the complaint. This provision provides that a party that refuses to accept an offer

---

[104] Section 1332 of title 28, United States Code, establishes Federal district court jurisdiction in cases involving diversity of citizenship

of settlement would be liable for the other party's reasonable legal fees if the offeree would have fared better by opting to settle. The claimant will not be liable for the defendant's attorney's fees in excess of the portion of the verdict for which a claimant may receive collateral benefits.

The purpose of this provision is to encourage settlements when a reasonable offer is made.[105] By doing this, S. 1400 will alleviate some of the delay problems associated with the current product liability system.

As Reported

Section 201(a) provides that a claimant may bring a civil action for damages against a person for harm caused by a product pursuant to State law, except to the extent that such law is superseded by this title. This section provides a mechanism for settlements of disputes. It does not create or eliminate causes of action or alter standards of liability under State law.

Section 201(b) provides that a claimant may, in addition to any claim for relief made pursuant to State law, include in the complaint an offer of settlement for a specific dollar amount.

Section 201(c) provides that the defendant may make an offer of settlement within 60 days after service of the claimant's complaint or within the time permitted for a responsive pleading pursuant to State law, whichever is longer. If the defendant's responsive pleading includes a motion to dismiss in accordance with applicable law, the defendant may tender payment in the amount of the settlement offer within ten days after the court's determination regarding such motion.

Section 201(d) provides that if an offer of settlement is made pursuant to section 201(b) or (c), the court may enter an order extending the applicable period for response upon a motion made prior to the expiration of the applicable response period. Any such motion must be accompanied by a supporting affidavit of the moving party setting forth the reasons why such extension is necessary to promote the interests of justice and recommending a schedule for discovery of evidence material to the amount of relief. The affidavit must state also that the information likely to be discovered is material and would not otherwise be available to the moving party after reasonable inquiry. Any such order granted by the court shall contain a schedule for discovery of evidence material to the issue of the appropriate amount of relief, and should not extend such period for more than 60 days. This section leaves it to the court's discretion to decide whether to grant a motion for an extension.

Section 201(e) provides that if the defendent does not accept the offer of settlement made by a claimant pursuant to section 201(b) and a verdict is entered for an amount equal to or greater than the specific dollar amount of the offer, the court shall include the reasonable attorney's fees and costs in the judgment entered. For the purposes of this section, reasonable attorney's fees are defined in section 201(g). Such fees shall be offset against any fees owned by the claimant to the claimant's attorney by reason of the verdict.

---

[105] Statement of Professors James Henderson and Aaron Twerski, May 10, 1990 hearing at 7.

This subsection recognizes that a claimant's attorney may be paid on a contingent basis rather than on an hourly fee basis. The amount of the penalty imposed upon a defendant does not change if the claimant's attorney is paid on a contingent basis. The defendant must pay reasonable attorney's fees, as defined in section 201(g).

Section 201(e) provides that a defendant must accept the offer in a timely fashion. The defendant must respond within the time permitted pursuant to State law for a responsive pleading or, if the defendant's pleadings included a motion to dismiss, within 30 days after the court's determination regarding such motion. Failure to respond to the claimant's offer within these time limits will trigger the imposition of the sanctions described above when the judgment is entered.

Section 201(f) provides that if the claimant does not accept the defendant's offer of settlement in accordance with section 201(c) and a verdict is entered for an amount equal to or less than the specific dollar amount of the settlement offer, the court shall reduce the amount of the verdict by an amount equal to the reasonable attorney's fees, as defined in section 201(g), and costs owed by the defendant to the defendant's attorney by reason of the verdict. The amount of this reduction shall not exceed that portion of the verdict which is allocated to economic and noneconomic losses for which the claimant has received or will receive collateral benefits as defined in section 102(3).

The claimant must respond within 30 days after the date on which the offer is made. If the claimant does not respond during that time and the verdict is not favorable to the claimant as described above, then the claimant will be required to pay attorney's fees and costs pursuant to this section.

Section 201(g) provides that for the purposes of section 201, attorney's fees shall be calculated on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and the complexity of the case.

SECTION 202—ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

In General

Section 202 allows either party to settle its dispute pursuant to an approved State ADR procedure. This may be initiated by either party and it may be undertaken in addition to, or in lieu of, the procedures in section 201.

If the offeree party is unwilling to participate in such a procedure and the court determines that the refusal was unreasonable or not in good faith, the court will assess reasonable attorney's fees and costs against the offeree. A rebuttable presumption is created that the offeree's refusal to participate in the ADR procedure is unreasonable or not in good faith if a verdict is entered that favors the offeror.

As Reported

Section 202(a) provided that either a claimant or a defendant may offer to proceed pursuant to a voluntary ADR procedure. Such

procedure must be established or recognized under either the law of the State where the civil action is brought or under the rules of the court in which such action is maintained. The offer to proceed under this section must be made within the time period established in section 201 for making a settlement offer. Except as explicitly provided in this section, it does not in any way preempt State ADR procedures. The determination of whether a party's refusal to enter into an ADR procedure was unreasonable shall occur after a verdict is entered or the proceeding is otherwise concluded (e.g., summary judgment granted, or directed verdict entered).

Section 202(b) provides that if the offeree refuses to proceed pursuant to such ADR procedures and the court determines that such refusal was unreasonable or not in good faith, the court shall assess reasonable attorney's fees and costs against the offeree. No sanctions would apply to either party in the event of a settlement.

Section 202(c) provides that a rebuttable presumption is created that a refusal by an offeree to proceed pursuant to such ADR procedure was unreasonable if a verdict is rendered in favor of the offeror.

TITLE III

This section of the bill sets forth uniform standards that govern product liability actions litigated in the courts.

SECTION 301—CIVIL ACTIONS

As Reported

Section 301 provides that a person seeking to recover for harm caused by a product may bring a civil action against the product's manufacturer or the product seller pursuant to applicable State or Federal law, except to the extent that such law is superseded by this bill. For the purposes of title III, this means that such civil actions will be governed by existing liability standards and rules, except to the extent that they are superseded by Federal standards.

SECTION 302—UNIFORM STANDARDS OF PRODUCT SELLER LIABILITY

In General

Section 302 specifies when a product seller other than a manufacturer [106] is responsible for harm caused by a product. A product seller is liable for harm caused (1) by its own failure to exercise reasonable care with respect to the product, or (2) by a product that fails to conform to an express warranty made by the product seller. In addition, the product seller may be liable as if it were the manufacturer if the manufacturer responsible is not subject to service of process or if the court determines that the claimant would not be able to enforce a judgment against the manufacturer.

In a majority of States, product sellers are liable for harms caused by a product as if they were manufacturers of the product.[107] Thus, product sellers may be held responsibile for product-

---

[106] "Product seller" is defined in section 102(14).

[107] W. Prosser, and W. Keeton, Torts (5th ed.) 1984 at 705. (This rule extends strict liability to product seller: "[A]ll States would accept the proposition that strict liability extends . . . to one who vouches for the manufacturer-assembler by selling a product assembled by another as his own. *Id. see also* P. Sherman, Product Liability at 234.

related harms that they did not cause and over which they had no control.

Two reasons have been advanced for holding product sellers liable as if they were manufacturers. First, it has been argued that the rule promotes safety and reduces the risk of harm, because product sellers will seek to avoid liability by pressuring manufacturers to make safe products.[108] This rationale, however, fails to recognize that manufacturers will feel the same, if not greater, pressure to make safe products if they are sued directly for harms caused by their own product defects.

Second, it has been argued that the rule is fair because a product seller who is held liable for harm caused by a manufacturer's defect can seek indemnity [109] and thereby shift the cost of liability to the manufacturer who actually caused the harm.[110] Data show that, in fact, product sellers account for less than 5 percent of product liability payments [111] because generally they are successful in shifting the cost of liability to the manufacturers.

Although the end result may be fair, the system is inefficient. Product sellers are routinely sued for harms caused by a manufacturer and are forced to incure substantial legal costs both to defend the product liability lawsuit and to seek indemnification from the responsible manufacturer.[112] As courts have recognized, the product seller is not truly "held harmless" through indemnification if the product seller must "expend large sums to defend a products liability action merely because a defective product, the defect of which may be attributable solely to the manufacturer's conduct, passed through [his or her] hands."[113] Further, indemnity does not reimburse product sellers for loss of good will or reputation caused by lawsuits.

Some cases [114] and a number of State statutes [115] have recognized the inequity of the majority rule. Section 302(a)(1) is based on the case law and State statutes which provide that manufacturers are responsible only for the harms caused by their own products, and claims should be brought directly against them rather than against product sellers. In the event, however, that the manufacturer responsible for the harm is not subject to service of process

---

[108] *E.g., Vandermark* v. *Ford Motor Co.*, 61 Cal. 2d 256, 391 P. 2d 168, 37 Cal. Rptr. 896 (1964).

[109] *See, eg.*, Ark. Stat. Ann. Section 16-116-107; Ariz. Rev. Stat. Ann. 12-684.

[110] *See, e.g., Hales* v. *Monroe*, 544 F. 2d 331 (8th Cir. 1976); Litton Systems Inc. v. *Shaw's Sales & Services, Ltd.*, 119 Ariz. 10, 579 p. 2d 48 (1978); Fairburn v. *Montgomery Ward & Co.*, 349 So.2d 1280 (La.App. 1977); *Anderson* v. *Somberg*, 158 N.J. Super. 348, 386 A.2d 413 (1978) *cert. denied*, 77 N.J. 509, 391 A.2d 522 (1978).

[111] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results, 35 (1977).

[112] *E.g., Kelly* v. *Hanscom Bros., Inc.*, 231 Pa. Super. 357, 331 A.2d 737, 740 (1974). ("It is not unusual for liability to move transactionally up the chain of distribution until the manufacturer ultimately pays. . . .").

[113] *Piedmont Equipment Co.*, v. *Eberhard Mfg. Co.*, 665 P.2d 256, 259 (Nev. 1983) (holding that a product seller, absolved of liability in a products case, may seek indemnification from the responsible manufacturer for his legal costs).

[114] *See, e.g., Sam Shainberg Co.* v. *Barlow*, 258 So.2d 242, 246 (Miss. 1972) ("[I]t would not be reasonable, logical or practical to place on every retail merchant the absolute duty of inspecting for latent defects in every article. . . that the retailer might offer for sale. Such a rule of law would make each retail merchant an insurer or guarantor of every one of the thousands of items he handles merely as a sales conduit.").

[115] *E.g.*, Colo. Rev. Stat. Section 13-21-402 (Supp. 1984), Idaho Code Section 6-1407 (Supp. 1985); N.C. Gen. Stat. Section 99B-2 (1985).

by the injured claimant or would be unable to pay the judgment, the product seller should be treated as if the product seller were the manufacturer. Under the cirumstances, the claimant would have no recourse unless the product seller is held responsible as the manufacturer.[116]

This approach eliminates unnecessary and burdensome legal costs and provides incentives for product safety without affecting a claimant's ability to recover for harms caused by a product defect.

As Reported

Section 302(a) identifies two situations in which a product seller other than a manufacturer is liable for harm caused by a product. Both follow the rule that a product seller is responsible for the consequences of the product seller's own conduct. This concept of individual responsibility, of placing responsibility on the party that actually caused and could have prevented the harm, encourages product safety on the part of product sellers.

First, a claimant will recover from a product seller if: the individual product unit that caused the harm was sold or otherwise placed in the stream of commerce by the product seller; the product seller failed to exercise reasonable care with respect to the product; and the failure to exercise reasonable care was a proximate cause of the claimant's harm. Second, a claimant will recover from a product seller if the product seller made an express warranty about the product, independent of any expressed warranty made by the manufacturer; the product failed to conform to the warranty; and the failure to conform to the warranty caused the claimant's harm.

Section 302(b) sets forth factors that may be relevant in determining whether the product seller failed to exercise reasonable prudence with respect to the product. The trier of fact may consider, among other factors, the effect of the seller's conduct with respect to the construction, inspection, or condition of the product and any failure of the product seller to pass on adquate warnings or instructions about the dangers and proper use of the product. The product seller is not liable for failure to warn if it provided to the person who took possession and control of the product any written warnings or instructions it had received up to that time, and made reasonable efforts to provide users with those warnings and instructions it received after the product left its possession and control. In addition, the seller shall not be liable, except for breach of express warranty, if there was no reasonable opportunity to inspect the product in a manner that would have or, in the exercise of reasonable care, should have revealed the product's danger. For example, a seller may not have had a reasonable opportunity to discover a product defect if the product was prepackaged [117] or if the product never passed through the seller's hands (e.g., a person may

---

[116] *See Vandermark* v. *Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 171, 37 Cal. Rptr. 896 (1964) ("the retailer may be the only member of that enterprise reasonably available to the injured plaintiff").

[117] *See* Ky. Rev. Stat. Section 411.340 (Supp. 1984); Tenn. Code Section 29-28-106 (Supp. 1985). *See also Brady* v. *Steyr-Daimler-Puch, A.G.*, 429 So. 2d 1348 (Fla. App. 1983) (summary judgment for distributor who shipped product in sealed container to dealer).

have held title to a product but may never have had possession of it).[118]

Section 302(c) provides that a product seller shall be treated as the product manufacturer and shall be liable for the claimant's harm as if the product seller were the manufacturer if (1) the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought by the claimant, or (2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer. For example, a judgment would be unenforceable if the court finds that the manufacturer is bankrupt, insolvent, or otherwise unable to pay. A claimant may recover from the product seller for harms that were caused by the manufacturer if one of the two provisions applies, and if the claimant proves that the manufacturer would have been liable under State law. Although section 302(c) departs from the notion of individual responsibility for harms, it ensures that a claimant can recover from the product seller if he or she is unable to recover from the manufacturer responsible for the harms.

Section 302 will encourage safety by placing responsibility on the party that caused and could have prevented the harm. It will reduce the unnecessary and inefficiencies associated with the current system. Sellers will no longer be exposed routinely to liability for harms caused by manufacturers. The legal costs of defending product liability claims and seeking indemnification will be substantially reduced. At the same time, section 302 ensures that claimants harmed by defective products may recover from product sellers if the responsible manufacturer be brought into court or is judgment-proof.

SECTION 303—UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES

In General

Section 303 establishes a uniform standard of liability for punitive damages. Such damages may be awarded only if the claimant establishes by clear and convincing evidence that the harm suffered was the result of the manufacturer's or product seller's conscious, flagrant indifference to the safety of those who might be harmed by a product. Except in certain circumstances, punitive damages may not be imposed upon manufacturers or sellers of prescription and over-the-counter drugs, and medical devices, as well as the manufacturers of aircraft, for harm caused by those products, when the safety of those products has been approved by the appropriate Federal agency prior to the marketing of the product. The defense is unavailable to a medical or aviation manufacturer who committed fraud during the reviewing process by withholding or misrepresenting relevant information. The defense is also unavailable to a manufacturer of prescription and over-the-counter drugs and medical devices, if the defendant made an illegal payment to an official involved the certification process for the purpose of securing approval of such drug or device. Finally, a manu-

---

[118] *See, e.g., Kirby* v. *Rouselle Corp.*, 108 Misc., 2d 291, 437 N.Y.S. 2d 512 (1981); *Canifax* v. *Hercules Power Co.*, 237 Cal. Appl. 2d 44, 46 Cal. Rptr. 552 (1965).

facturer or product seller may request that the trier of fact conduct a separate proceeding on the punitive damages issues.

The purpose of punitive damages is to punish a defendant for outrageous conduct and deter such conduct in the future by the defendant and by others.[119] Such damages are a quasi-criminal sanction and, thus, go beyond compensating the claimant for the claimant's injuries. Punitive damages may be awarded to a claimant in civil actions in most States. Five States have prohibited punitive damage awards except in those instances where there is explicit statutory authorization for specific cases.[120]

The trier of fact has total discretion over whether punitive damages should be assessed against a defendant. State standards or guidelines for determining whether a defendant should pay punitive damages are not uniform; these standards involve some degree of conscious misconduct and refer variously to "willful," "wanton," "malicious," or "reckless" disregard for the rights of others.[121]

In most jurisdictions today, the claimant must prove by a preponderance of the evidence that the defendant acted in a manner that warrants punitive damages. However, 22 States have adopted a standard of clear and convincing evidence as the burden of proof for punitive damages. Nineteen States have done so by legislation, and three by judicial decision.[122] To reflect the quasi-criminal nature of such punishment, section 303 of the bill follows this emerging rule: the burden of proof is raised to clear and convincing evidence, a standard of proof closer to the criminal law standard for imposing punishment.

While commentators disagree as to the full extent of this growth, it is clear that punitive damage awards have been increasing both in size and in number in the past ten years. Until 1977, there had been only a small number of punitive damage awards in products liability cases. Since then, the frequency of these awards has increased. Punitive damages are routinely sought[123] and, when awarded, tend to be very large.[124]

---

[119] *See* Restatement (Second) of Torts Section 908 (1) (1965).

[120] Punitive damages not permitted in Louisiana, *e.g., Ricard v. State*, 390 So. 2d 882 (La. 1980); Massachusetts, *e.g., Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir.) (dictum), cert. denied, 393 U.S. 940 (1968), Nebraska, *e.g., Abel* v. *Conover*, 104 N.W. 2d 684 (Neb. 1960); and Washington, *e.g., Kammerer* v. *Western Gear Corp.*, 96 Wash. 2d 416, 618 P.2d 1330 (1980) New Hampshire, *e.g.*, N.H. Rev. Stat. Ann. Section 507:16 (Supp. 1988). Other States put some limits on the allowance of punitive damages, for example, in breach of contract or wrongful actions.

[121] *See* J. Chiardi & Kircher, "Punitive Damages-Law and Practice," Section 5.01 at 8 (1981), Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1,38 (1982); Owen, "Problems In Assessing Punitive Damages Against Manufacturers of Defective Product," 49 U. Chi. L. Rev. 1, 21 (1982).

[122] */See, e.g.,* Ala. Code Secton 6-11-20(a) (Supp. 1989); *Linthizum* v *Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (en banc). *See also* Colo. Rev. Stat. Section 13-25-127 (2) (1973) (proof beyond reasonable doubt).

[123] American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 16 (March 3, 1989).

[124] The Alliance of American Insurers' continuing series of studies of large (over $100,000) product liability claims found that in 1975 punitive damages were sought in only 5 percent of product liability cases; by 1979, they were being sought in 18 percent of cases. AAI Survey of Large-Loss Product Liability Claims (1980) at iii. The Rand Institute for Civil Justice study found that the average punitive damage award in personal injury cases in Cook County, Illinois increased from $40,000 to $1,152,174 in 1980-84. *See* Peterson, Punitive Damages: Preliminary Empirical Findings, Rand Corp. N-2342-ICJ at 25 (1985), cited in Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability at 39-43 (1986). (These figures were adjusted for inflation and are stated in 1984 dollars.) *See generally* Schwartz, *Deterrence and Punishment in the*

Continued

A claimant may include, as a routine matter, a count for punitive damages in a product liability complaint in order to have an opportunity to present evidence to the jury as to the resources of the defendant; [125] moreover, such claims discourage settlement, because of the absence of clear guidelines as to liability. As one legal scholar has noted:

When the prospect of punitive damages enters the picture, these guidelines disappear. It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon. Furthermore, a defendant who believes that the situation does not call for punitive damages cannot factor their potential into settlement discussions. To do so is to set a pattern for all future settlements in countless cases already in litigation or yet to be brought. In short, unless the situation truly calls for punitive damages, they sabotage settlement negotiations by thrusting a huge "unknown" into the negotiations.[126]

Moreover, punitive damage awards are excessive as most are reduced substantially after trial according to a recent study.[127] Juries need clear standards to apply when deciding whether a defendant's conduct merits the assessment of punitive damages.

At present, compliance with government standards is not a defense against punitive damages.[128] Instead, courts generally are not bound by safety determinations made by regulatory agencies. The results have raised questions about judicial nondeference to agency determinations with respect to industries that are comprehensively regulated.[129] Such was the case, for example, when a Kansas jury decided to assess $8 million in punitive damages against the manufacturer of the Sabin polio vaccine, although this verdict was reversed on appeal.[130] One scholar concluded that the jury "was invited to, and did, impose punitive damages for the purpose of forcing the United States to change its polio vaccination policy."[131]

As Reported

Section 303(a) specifies when punitive damages may be assessed against a manufacturer or product seller in a product liability action. If otherwise permitted by applicable law, punitive damages

---

Common Law of Punitive Damages: A Comment, 56 S. Cal. L. Rev. 133 (1982); Owen, *Problems in Assessing Punitive Damages Against Manufacturer of Defective Products*, 49 U. Chi. L. Rev. 1 (1982).

[125] American College of Trial Lawyers Report at 6, 16.

[126] Twerski, *supra*, 18 U. Mich. J. of L. Ref. 575, 612.

[127] GAO Report at 42.

[128] Compliance with a Federal, State or local government safety standard is not generally a defense of any sort in a product liability action; however, four State statutes do provide for consideration of compliance with government standards as a defense in product liability actions. In Utah, Colorado, Tennessee, and North Dakota, such compliance establishes a rebuttable presumption as to the safety of the product. In New Hampshire, such compliance is one element of an affirmative defense. *See* Utah Code Ann. 78-15-6(3); Colo. Rev. Stat. 13-21-403(1)(b); Tenn. Code Ann. 29-28-104; N.D. Century Code 28-01-05(3); N.H. Rev. Stat. Ann. Ch 507-D:4.

[129] *See, e.g.*, Huber, "Safety and the Second Best: The Hazards of Public Risk Management in the Courts," 85 Col. L. Rev. 277 (1985); *The Bhopalization of U.S. Tort Law*, Issues in Science and Technology, Fall 1985.

[130] *Johnson* v. *American Cyanamid Co.*, Eighteenth Judicial District for the District of Sedgwick County, Kansas, June 1984, reversed, Kan. Sup. Ct., No. 57,369. The Kansas Supreme Court reversed by a narrow 4-3 margin, and did not reach the government standards issue.

[131] Edmund W. Kitch, *Vaccines and Product Liability: A Case of Contagious Litigation, Regulation, May/June 1985, at 15.*

may be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by a product. The clear and convincing evidence burden of proof was recommended by the American Bar Association in 1987 and by the American College of Trial Lawyers in 1989.[132] Moreover, one State has adopted an even higher standard. Colorado requires proof beyond a reasonable doubt for the awarding of punitive damages.[133]

The standard of liability for punitive damages in this section requires a "conscious, flagrant indifference" to consumer safety. This is a high standard of culpability, requiring a showing of fault far in excess of mere negligence. The specifications that the misconduct be "conscious" and "flagrant" are designed to assure that punitive damages will not be assessed unless the defendant's conduct was knowingly far in excess of acceptable behavior. The misconduct must be an extreme deviation from ordinary conduct.[134]

It is important to establish the punitive damages threshold far from ordinary negligence in order to assure that manufacturers are not subjected to punitive damages assessments, on top of compensatory damages, for making good faith errors.[135] As one legal scholar has explained:

> [E]ven if the product is finally found "defective," the case for punitive damages almost always will be quite weak if a plausable case for nondefectiveness was made the other way. Such damages usually will not be appropriated unless the product was very defective, and plainly so, at the time it was sold. A plaintiff usally should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all.[136]

Finally, to be "conscious" of its flagrant misconduct, a manufacturer or product seller must be aware that its product is legally defec-

---

[132] *See* American Bar Association Action Commission to Improve the Tort Liability System, Report to the House of Delegates: Recommendations to Improve the Tort System (adopted FEB. 1987) [hereinafter ABA Action Commission Report]; American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice*, 18-19 (March 3, 1989) [hereinafter American College of Trial Lawyers Report].

[133] Colo. Rev. Stat. Section 13-25-127(2) (Supp. 1979).

[134] *See* W.P. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on Torts 214 (5th ed. 1984); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1368-69 (1976); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 20-28 (1982); Owen, Civil Punishment and the Public Good, 56 So. Cal. L. Rev. 103, 116 (1982) ("Punishment becomes appropriate [only] at an 'extreme' distance from the norm, where the conduct has become clearly flagrant").

[135] Owen, *supra* note 118, 49 U. Chi. L. Rev. at 27-28. *See Laney* v. *Coleman Co.*, 758 F.2d 1299 (8th Cir. 1985) (reversing punitive damages award); *Roth* v. *Black & Decker, U.S., Inc.*, 737 F.2d 779 (8th Cir. 1984) (same). *See also American Motors Corp* v. *Ellis*, 403 So.2d 459, 469, (Fla. App. 1981) (Cowart, J., dissenting in part) ("Even assuming that the AMC engineers were wrong in these determinations, at most that could only amount to negligence, not the malicious refusal to implement a 'safer' design required to support an award of punitive damages."); *Ford Motor Co.* v. *Nowak*, 638 S.W.2d 582, 598, 602 (Tex. App. 1982) (Gonzalez, J., dissenting) ("there is no evidence that Ford was consciously indifferent to appellees' rights"); *American Cyanamid Co.* v. *Roy*, 466 So.2d 1079, 1085 (Fla. App. 1984) (Amstead, C.J., dissenting in part on rehearing) ("The facts simply do not reflect the kind of flagrant misconduct that would justify" punitive damages).

[136] Owen, *supra* note, 49 U. Chi. L. Rev. at 38.

tive and that its conduct in selling it in such a condiction is therefore improper. Mere consciousness that its product is dangerous, that it can or indeed probably will cause substantial harm or even death, is thus insufficient by itself, since manufacturers of many dangerous products—such as cars, power saws, and chemicals—surely are fully conscious of the inherent dangers in their products.[137] It is only when a manufacturer consciously leaves in its product a danger that is unreasonable, and sells the product to the public knowing it to be defective, that it conduct can be said to manifest a "conscious, flagrant indifference" to consumer safety.[138]

Section 303(a) adds that a failure to exercise reasonable care in choosing among alternative designs, formulations, instructions, or warnings is not, in itself, conduct for which the award of punitive damages would be appropriate. This sentence clarifies further the punitive damages standard of liability by drawing a clear distinction between mere negligence and the aggravated misconduct which justifies the imposition of punitive damages. The mere failure to exercise reasonable care as to such a choice does not, in itself, warrant the imposition of punitive damages. In some circumstances, however, failure to exercise reasonable care as to a whole series of choices might constitute aggravated misconduct for which punitive damages are appropriate.

The "clear and convincing evidence" standard of section 303(a) requires more proof than the "preponderance of the evidence" standard of proof traditionally used in civil actions; however, it requires less proof than the "beyond a reasonable doubt" standard that is required for use in criminal actions.[139] Thus, it is a standard of proof between the civil and criminal standards. This standard is appropriate for determining what is, in effect, a quasi-criminal sanction in a civil case.[140] It was proposed in the Uniform Product Liability Act and has recently been adopted by some States as the sound and fair rule.[141]

The rationale for the higher standard of proof rests on fairness. As one commentator explained:

> [A]n unjustified punitive damages award causes more harm to the defendant than erroneous failure to award punitive damages to the plaintiff. To reflect this imbalance, the burden of proof should favor the defendant more than does the "a preponderance of evidence test." [142]

---

[137] *Id.* at 16, 24.

[138] *See Roth* v. *Black & Decker, U.S., Inc.*, 737 F.2d 779 (8th Cir. 1984) ("the evidence must show that the defendant was aware that its acts were wrongful in some way"); Prosser and Keeton on Torts *supra* note 1, at 214 n.62 ("a consciousness that the conduct is unlawful or morally wrong"); R. Epstein, *Modern Products Liability Law* 181 ("defendant knew that the conduct was wrongful").

[139] "Clear and convincing evidence" is defined in section 102(2). "Preponderance of the evidence" is defined in section 102(12).

[140] *See* Owen, "Crashworthiness Litigation and Punitive Damages," 4 J. Prod. Liab. 221, 226 (1981).

[141] Uniform Product Liability Act Section 120, 44 Fed. Reg. 62714, 62748 (1979). *See also* note 119, *supra*.

[142] Wheeler, "The Constitutional Case for Reforming Punitive Damage Procedures," 69 Va. L. Rev. 269, 298 (1983).

A higher standard of proof is necessary to ensure that punitive damages are assessed only where appropriate.

Section 303(a) adds, as well, that punitive damages may not be awarded in the absence of a compensatory award, except as provided in subsection (b), which addresses an issue that is unique to the wrongful death law of a few States. Section 303(b) relates to wrongful death product liability actions where applicable State law provides, or has been construed to provide, that only punitive damages are recoverable.[143] In these unique situations, punitive damages are a substitute for compensatory awards. In such situations, a defendant is liable for punitive damages regardless of whether a claim is asserted under section 303. Further, recovery of damages in such an action shall not bar a claim under this section.[144]

Section 303(c) bars an award of punitive damages against manufacturers and sellers of prescription and over-the-counter drugs (including vaccines and other biologicals) and medical devices, as well as against manufacturers of aircraft including aircraft components, for harms caused by those products, when the safety of those products has been reviewed and recognized by the appropriate Federal agency. Five States have enacted similar Food and Drug Administration (FDA) defenses against punitive damages.[145] The defense in section 303(c) is not, however, available to any defendant who has committed fraud during the approval or review process by withholding or misrepresenting material and relevant information, with respect to the approval or review of the product in question, from any agency involved in the approval or review process. The defense is also unavailable to any manufacturer or seller of prescription and over-the-counter drugs or medical devices that makes an illegal payment to an FDA official for the purpose of securing approval of such drug or device. This last limitation on the defense is in response to the generic drug approval scandal.[146]

Section 303(c) is intended to deal with the question of imposition of punitive damages in those actions involving drugs, medical devices, and aircraft. It is not intended to preempt State laws that may establish any other defense against liability in product liability actions based on compliance with government standards or the requirements of statutes or regulations concerning product design, labeling, or warnings.

This defense applies to drugs as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)) or medical devices as defined under section 201(h) of the same Act. Punitive damages shall not be awarded when these products are approved by the FDA and are subject to pre-market approval by the agency with respect to the safety of the formulation or performance of the aspect of such drug or device which caused the claimant's harm, or the adequacy of the packaging or labeling of such

---

[143] *See* Ala. Code 6-5-410 (1975).

[144] *Cf.*, Federal Tort Claims Act, 28 U.S.C. Section 2674 (1982).

[145] The five states are Arizona, *e.g.*, Ariz. Stat. Ann. Section 12-701; New Jersey, *e.g.*, N.J. Stat. Ann. Section 2A:58C-5(c); Ohio, *e.g.*, Ohio Rev. Code Ann. Section 2307.80; Oregon, *e.g.*, Or Rev. Stat. Section 30.927; Utah, *e.g.*, Utah Code Ann. Section 78-18-2.

[146] Testimony of Richard Kingham, May 10, 1990 hearing.

drug or device.[147] In addition, this provision applies to drugs that are generally recognized as "safe and effective" pursuant to conditions established by the FDA and applicable regulations, including packaging and labeling regulations.

Likewise, this defense applies to aircraft which are subject to pre-market certification by the Federal Aviation Administration (FAA) with respect to the safety of the design or performance of the aspect of such aircraft which caused the claimant's harm or the adequacy of the warnings regarding the operation or maintenance of such aircraft. Punitive damages shall not be awarded against the manufacturer of such an aircraft or aircraft components certified by FAA under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.), provided the manufacturer complied with FAA requirements and obligations regarding continuing airworthiness after delivery of the aircraft to a user. This includes FAA requirements to provide maintenance and service information related to airworthiness whether or not such information is used by the FAA to prepare mandatory maintenance, inspection, or repair directives.

The Federal Government has implemented comprehensive regulatory structures which require that a governmental agency regulate the safety of products such as drugs and aircraft.[148] The Government has delegated to an agency with specific expertise the ability and obligation to establish reasonable and effective safety standards. The Government has established and funded these regulatory systems to assess the safety risks of these products for consumers. Where the Government has carefully assessed these risks and certified that these products meet safety standards established by expert regulatory agencies, manufacturers should not be punished by individual juries or threatened with punitive damages on a case-by-case basis.

Section 303(c) contains a provision removing this defense where a defendant has withheld or misrepresented material and relevant information concerning the product's performance, operation, or maintenance. The rationale behind the defense is based on the Federal Government's access to and knowledge of product information. Thus, section 303(c) of the bill shields a defendant from punitive awards only if it has disclosed to the appropriate Federal regulatory agency all required information during and after the licensing

---

[147] This provision does not apply to medical devices that were never subject to pre-market approval by the FDA, such as the intrauterine device known as the Dalkon Shield, which was taken off the market before FDA pre-market regulation of medical devices began in 1976. *See* Report on H.R. 11124, Medical Devices Amendments of 1976, H. Rep. No. 94-853, 94th Cong., 2nd Sess. 8 (1976).

[148] In the cae of drugs and medical devices, Section 505 of the Federal Food, Drug and Cosmetics Act provides that a drug must be "safe and effective." Moreover, these products are generally evaluated on a risk-benefit basis. *See* Report Prepared by the Subcommittee on Science, Research, and Technology, "The Food and Drug Administration's Process for Approving New Drugs," 96th Congress 2nd Sess. (Committee Print 1980) at 21; Merrill, *Compensation for Prescription Drug Injuries*, 59 Va. L. Rev. 8-10 (1973); In the case of aircraft, section 601 of the Federal Aviation Act (FAA), directs the Secretary to "promote safety" of civil aircraft and to establish "standards governing the design, materials, workmanship, construction and performance of aircraft . . . in the interest of safety." Moreover, section 305 of the FAA Act directs the Secretary "to encourage and foster the development of civil aeronautics and air commerce." In the case of both of these products, the Federal Government is certifying the safety of these products for consumer use. *See also:* Testimony of Richard Kingham; Statement of Robert Martin, *supra*, note 42.

process. Where a defendant withholds information or misleads a Federal agency or official, the defense shall not apply.

Section 303(c) provides further that in any case in which a defendant made an illegal payment to an official from FDA in order to secure approval of a drug or medical device, the defendant is not afforded the protection against punitive damages provided in section 303(c).

In sum, section 303(c) represents a congressional determination that drugs and aircraft are so extensively regulated for society's benefit that punitive damages are not appropriate. In the case of these products, the Government has conducted a thorough review of the product's safety aspects and risks and has dedicated a great deal of resources to assessing its benefits and risks for society. As a result, the tort system should defer to that regulatory judgment.

Section 303(d) provides that a manufacturer or product seller may request that the trier of fact conduct a separate proceeding to consider (1) whether punitive damages are to be awarded and the amount of such award, or (2) the amount of punitive damages following a determination of punitive liability. In such a proceeding, evidence relevant only to the claim of punitive damages, as determined by State law, shall be inadmissible in any proceeding to determine whether compensatory (economic and noneconomic) damages are to be awarded. Both the American Bar Association and the American College of Trial Lawyers have recommended bifurcation of punitive damage claims. These groups believe bifurcation can avoid prejudice to defendants by providing that evidence of wealth or financial condition is admissable only on the punitive damage claim.[149]

Section 303(e) provides that when the trier of fact determines the amount of punitive damages to be awarded, all relevant evidence should be considered including the financial condition of the manufacturer or product seller, the severity of harm, the duration of the conduct, any concealment of the conduct, the profitability of the conduct, the number of products sold, other awards of punitive or exemplary damages to persons similarly situated to the claimant, and any criminal penalties or civil fines assessed against the manufacturer or product seller as a result of the conduct complained of by the claimant.

Section 303 does not preempt State laws that limit the amount of punitive damage awards nor does it create any rights to punitive damages in those States that do not currently permit recovery of punitive damages.

SECTION 304—UNIFORM TIME LIMITATIONS ON LIABILITY

In General

Section 304 establishes uniform standards of limitation and repose. All civil actions governed by the bills are subject to a uniform statute of limitations that runs for two years from the discovery of the harm and its cause. In addition, such actions are subject to a 25-year statute of repose, which establishes the time period during which a manufacturer or product seller may be held respon-

---

[149] *See* ABA Action Commission Report; American College of Trial Lawyers Report at 15–16.

sible for harm allegedly caused by capital goods, except in cases involving toxic harm. The statute of repose applies only in cases where the claimant is entitled to receive worker's compensation benefits.

The two-year statute of limitations for product liability actions begins to run when the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. This provision will ensure that a claim is not barred before the claimant knows or has reason to know about the claimant's harm. A uniform statute of limitations for product liability actions will benefit injured persons whose rights to sue will no longer depend on which State statute happens to apply to their claim.

This section's 25-year time limitation on liability for harm allegedly caused by capital goods, referred to as a statute of repose, bars actions seeking recovery for harm caused by such products. This time limitation on liability establishes the period during which a manufacturer or product seller may be held responsible for harm caused by the product. The rationale for this time limitation is that manufacturers and product sellers of capital goods, which usually have a long life, should not be exposed to liability for harms caused by these products for an unlimited period of time.[150]

All States have statutes of limitations that have been applied to product liability actions.[151] A statute of limitations specifies that time within which the claimant must file his or her action. Failure to file within the specified time bars the claim.

In a number of States, the statute of limitations period begins to run at the "time of injury." [152] When an injury caused by a product is immediate and traumatic, this date is easy to determine. The claimant generally knows of his or her harm and the cause of the harm at the time of the injury. However, where the harm has a latency period or becomes manifest only after repeated exposure to the product, the claimant may not know immediately of the harm or its cause. In these situations, a "time of injury" statute of limitations may expire and bar a claim before the claimant even knows he or she has been harmed.

In response to this problem, some courts and State legislatures have adopted a rule under which the limitations period begins to run when the claimant discovers the harm.[153] Even this rule may be unfair, however, because the claimant may not discover the actual cause of his or her harm until some time after he or she discovers the harm itself. The statute of limitations may expire before

---

[150] According to testimony received by the Committee, 30 percent of the lawsuits brought against machine tool manufacturers involve machines that are over 25 years old. As a result of the transaction costs associated with this litigation, this industry spends seven times as much on product liability cases as on research and development. Testimony of Howard H. Fark, February 22, 1990 hearing.

[151] Under present law, different statutes of limitations apply in product liability actions depending upon the particular theory of the case. For example, a statute of limitations applicable in tort may be the rule in an action based on negligence while a statute of limitations applicable in contract may be the rule in an action based on breach of warranty. The bill will establish one statute of limitations for all product liability actions.

[152] *See, e.g., Wojcik* v. *Almase*, 451 N.E. 2d 336 (Ind. App. 1983); *New Mexico Electric Service Co.* v. *Montanez*, 89 N.M. 278 (551 P. 2d 634 (1976); *Lange* v. *Bucyrus-Errie Co.*, 707 F.2d 94 (4th Cir. 1983).

[153] *See, e.g.*, Conn. Gen. Stat. 52-577(a)(1983); *Witherall* v. *Weimer*, 52 Ill. 2d 146, 421 N.E. 2d 869 (1985); *Hansen* v. *A.H. Robins, Co.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983); *Hines* v. *Tenneco Chemicals, Inc.*, 546 F. Supp. 1229 (S.D. Tex. 1982).

the claimant can reasonably discover both his or her harm and its cause.[154]

A growing number of courts and State legislatures has addressed this problem by adopting a statute of limitations that does not expire until the claimant discovers both the claimant's harm and the cause of the harm.[155] The Committee believes that this rule is the better reasoned approach and that it strikes a fair balance between the interests of the parties.

As noted, section 304 also establishes a uniform statute of repose for product liability actions. Sixteen States have adopted such statutes of repose in response to the problems created by open-ended liability for old products—the so-called "long tail" of liability.[156] Some States have adopted conclusive statutes, which establish an absolute bar to product liability actions for harms caused after a specified period. These time periods range from 8 to 12 years and are applicable to harms caused by all products.[157]

As Reported

Section 304(a) provides that in any civil action brought under the bill, the complaint must be filed within two years of the time the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. Actions filed more than two years after the harm and its cause were or should have been discovered are barred.

If a person with a product liability claim has a legal disability—for example, the person is a minor or is insane—the person may file his or her complaint any time until two years after the legal disability ceases. If the filing of a product liability complaint is stayed or enjoined by court order, the running of the two-year period of limitations is suspended until the stay or injunction is lifted or ceases.

Section 304(b) provides that any product liability action alleging harm, which is not toxic harm,[158] caused by a capital good is

---

[154] As one judge said, this follows the logic of "topsy-turvy land" where one can "be divorced before [he] ever . . . marr[ies], or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad." *Dincher* v. *Marlin Firearms Co.*, 198 F2d 821, 823 (2d Cir. 1952) (Frank J. dissenting).

[155] *See, e.g., Williams* v. *Borden, Inc.* 637 F.2d 731, 734 (10th Cir. 1980); *Nelson* v. *A.H. Robbins, Co.*, 515 F. Supp. 623 (N.D. Cal. 1981); *Lundy* v. *Union Carbide Corp.* 695 F.2d 394 (9th Cir. 1982); *Fidler* v. *Eastman Kodak Co.*, 555 F. Supp. 87 (D. Mass. 1982) *aff'd*, 728 F.2d 729 (5th Cir. 1989).; *Mack* v. *A.H. Robins Co.*, 573 F. Supp. 149 (D. Ariz. 1983) *aff'd*, 759 F.2d 1482 (9th Cir. 1985); *Olsen* v. *Bell Telephone Laboratories, Inc.*, 388 Mass. 171, 445 N.E. 2d 609 (1983); *Elmore* v. *Owens-Illinois, Inc.*, 673 S.W. 2d 434 (Mo. Ct. App. 1983); *Sahlie* v. *Johns-Manville Sales Corp.*, 99 Wash. 2d 550, 663 P. 2d 473 (1983).

[156] "Statutes of repose for products currently exist in some form in at least 16 states. In all but one state, these statutes of repose apply to *all* products, and are not limited to capital goods." Ariz. Rev. Stat. Ann. Section 12-551; Ark. Stat. Ann. Section 34-2804(c); Colo. Rev. Stat. Section 13-80-107; Conn. Gen. Stat. Section 52-577; Ga. Code Ann. Section 51-1-11; Idaho Code Section 6-1403; Ill. Rev. Stat. ch. 110, para. 13-213(b); Ind. Code Section 33-1-1.5-5; Kan. Stat. Ann. Section 60-3303; Ky. Rev. Stat. Ann. Section 511.310; Mich. Comp. Laws Section 600.5805; Minn. Stat. Section 604.03; Neb. Rev. Stat. Section 25-224; Or. Rev. Stat. Section 30.905(1); Tenn. Code Ann. Section 29-28-103; and Wash. Rev. Code Section 7.72.060. None of these statutes of repose is limited to cases where the claimant is eligible to receive workers compensation benefits.

[157] *See, e.g.*, Ill. Stat. Ann. Ch. 110, 13-214(b) (1984) (claim is barred if harm occurred more than 12 years after the first sale, lease, or delivery, or ten years after the sale to the initial user, whichever is shorter); Or. Rev. Stat. Ann. 30.905(1) (Supp. 1985) (eight-year statute of repose).

[158] As defined in section 304(3)(c), "toxic harm" means harm which is functional impairment, illness, or death of a human being resulting from exposure to an object, substance, mixture, raw material or physical agent of particular chemical composition. Recovery for such harm is not impeded by the 25-year statute or repose for capital goods.

barred unless the complaint is served and filed within 25 years of the date of delivery of the product to its first purchaser or lessee who has not engaged in the business of selling or leasing the product or using the product as a component part. Section 304(b) applies only if the claimant has received or is eligible to receive workers' compensation benefits for harm caused by the product. Section 304(b)(3)(B) defines "capital good" as any product or component part of any product, which is both of a character and type depreciable under the Internal Revenue Code of 1986, and (1) used in a trade or business, (2) held for production of income, or (3) sold or donated to a governmental or private entity for the production of goods, for training, for demonstration, or for other similar purposes.

Section 304(b)(2) provides that any motor vehicle, vessel, aircraft, or railroad used primarily to transport passengers for hire shall not be subject to the time limitations set forth in subsection (b).

Section 304(c) provides that the time limitations in this section do not affect the right of any person to seek contribution or indemnification from the person who is actually responsible for the harm.[159]

SECTION 305—UNIFORM STANDARDS FOR OFFSET OR WORKERS' COMPENSATION BENEFITS

In General

Section 305 clarifies the relationship between the workers' compensation system and the product liability system with rules that keep these systems separate, minimize legal costs, and promote safety. Section 305 eliminates the employer's subrogation lien and strengthens employer immunity from tort liability without affecting the employer's obligation to pay workers' compensation benefits. The exception is when the employer can prove that it or the employee-claimant's coworkers were in no way responsible for the claimant's harm. Further, a manufacturer is prohibited from suing an employer for contribution to a product liability award. If the employer attempts to assert a subrogation lien, the employer loses his or her protection against a suit for contribution. These rules provide economic incentives for the employer to minimize workplace accidents and, by eliminating the subrogation lien in most cases, section 305 reduces transaction costs. The employee-claimant obtains from the employer the workers' compensation benefits to which he or she is entitled and may obtain tort damages from the responsible manufacturer reduced by the amount of benefits he or she has been paid. Subtracting the amount of workers' compensation benefits from the product liability judgment prevents double recovery by the employee, and thus, serves the purpose of the subrogation lien without the associated legal costs. The manufacturer pays for the harm caused by the manufacturer's own conduct and the employer or coworker less the amount of workers' compensation.[160]

---

[159] *See* Uniform Product Liability Act, sec. 110(B)(2)(C), 44 Fed. Reg. 62714, 62732-33 (1979).

[160] The reforms contained in this section have been advocated for many years by Professor Arthur Larson, a leading expert on workers compensation law. *See* testimony of Professor

Continued

Workers' compensation statutes are designed to ensure that an employee injured in the course of his or her employment has a fast and inexpensive way to recover for his or her injury, regardless of who, if anyone, is at fault for causing the injury. The employer automatically pays workers' compensation benefits to an employee injured in the course of employment, without regard to fault. As originally conceived, workers' compensation is a tradeoff: while the employer is liable regardless of fault, the employer is immune from tort liability for the injury. Workers' compensation was, thus, intended to be the employee's exclusive remedy against the employer for work-related injuries.[161] The purpose of the system is to provide swift and certain recovery for injured workers, while maximizing the incentives for employers to maintain a safe workplace.

However, the safety incentive provided by workers' compensation has been undermined by the subrogation lien, which allows an employer to shift the costs of the workers' compensation system to the product liability (tort) system.[162] In most States, an employer can recover the amount of workers' compensation benefits the employer pays to an injured employee through a subrogation lien, if the employee has a successful product liability claim against a manufacturer or product seller. This is done regardless of whether the employer is responsible for the injury.

Some States have gone to the other extreme by permitting employees and manufacturers in product liability actions to recover from the employer. Also, employees have been permitted in some States to bring product liability suits against their employers. In addition, manufacturers have been permitted in a few States to sue employers in contribution and implied indemnity actions on the basis that it was the employer who caused all or a part of the employee-claimant's harm.[163] Other States permit such suits, but limit the amount recoverable to the employer's workers' compensation liability.[164] Most jurisdictions, however, respect the employer immunity concept and do not permit a manufacturer to shift the tort judgment to the employer through a contribution or indemnity action.[165]

In sum, the current relationship between the workers' compensation system and the product liability system generates substantial and unnecessary legal costs, leads to unfair cost shifting between the two systems, and may reward unsafe workplace practice.

Larson, Hearings on S. 44 before the Subcommitte on Consumer of the Senate Committee on Commerce, Science, and Transportation, 98th Cong., 1st Sess., pp. 269-270 (1983) (Serial No. 98-302).

[161] A. Larson, 2A "The Law of Workmen's Compensation" Sec. 65.10 (1982). *See Kofron* v. *Amoco Chem. Corp.*, 441 A. 2d 226 (Del. 1982).

[162] Statement of Victor Schwartz, May 10, 1990 hearing, at 3.

[163] *E.g., Skinner* v. *Reed-Prentice Div.*, 70 Ill, 2d 1, 374 N.E. 2d 437 (1977), cert. denied, 426 U.S. 946 (1978); *Dole* v. *Dow Chem. Co.* 130 N.Y. 2d 143, 331 N.Y.S. 2d 382, 282 N.E. 2d 288 (1972).

[164] *Lamberton* v. Cincinnati Corp., 312 Minn. 114, 257 N.W. 679 (1977).

[165] *E.g., Hammond* v. *Kolberg Mfg. Corp.*, 542 F. Supp. 662 (D. Colo. 1982); *Glass* v. *Stahl Specialty Co.*, 97 Wash. 2d 880, 652 P. 2d 948 (1982); *Union Carbide Corp.* v. *Dunn Bros. Gen. Contractors*, 294 F. Supp. 704 (M.D. Tenn. 1968); *Jack Morgan Constr. Co.* v. *Larkan*, 254 Ark. 838, 496 S.W. 2d 431 (1973).

As Reported

Section 305(a) specifies how product liability judgments are calculated in actions involving claimants who are entitled to workers' compensation benefits. Any damages awarded would be reduced by the value of past and future workers' compensation benefits received for the same harm. A court or jury determination of workers' compensation benefits shall have no binding effect on and shall not be used as evidence in any other proceeding.

The calculation works as follows. The claimant's total damage for which the defendant would be liable is reduced by the amount of workers' compensation benefits that the claimant is entitled to receive under State or Federal law for the same harm.[166] Judgment is then entered in the amount remaining against the defendant.

Section 305(b) provides that a claimant in a court action subject to this title who is or who may be eligible to receive workers' compensation benefits must provide written notice to the employer of the filing of the civil action within 30 days of the filing. Such notice must include the following information; the date of the filing; the court in which the civil action was filed; the names and addresses of all plaintiffs and defendants appearing on the complaint; the court docket number, if available; and a copy of the complaint. This notice must be filed with the court and served on all parties. Failure by the claimant to comply with these requirements will result in the suspension of the deadlines for filing responsive pleadings and commencing discovery proceedings, until the claimant complies with this requirement. The purpose of this requirement is to preserve the rights of an employer to pursue a subrogation lien pursuant to the terms of this section.

Section 305(c) permits a claimant, who has sole discretion to seek a stay, to obtain a stay in the product liability action until the amount payable as workers' compensation benefits has been determined under the workers' compensation law.

Section 305(d)(1) eliminates the employer's subrogation lien—the right of an employer to recover the amount of workers' compensation benefits paid to the injured employee-claimant in a product liability action.

Unless the manufacturer or product seller has expressly agreed to indemnify or hold the employee harmless for harm caused by a product, neither the employer nor the workers' compensation insurance carrier of the employee shall have a right of subrogation, contribution, or implied indemnity against the claimant's recovery from a manufacturer or product seller. This provision will reduce the transaction costs associated with pursuing a subrogation lien.

Section 305(d)(2) provides that a claimant's employer or the workers' compensation insurer of the employer may assert a subrogation lien by proving that the claimant's harm was in no way caused by the fault of the claimant's employer or coworkers. An employer's or the employer's workers' compensation insurer's right

---

[166] In a hypothetical case, a claimant is entitled to $50,000 in workers' compensation benefits and sustains total damages of $500,000. The judgment against the defendant would be $450,000, calculated as follows: $500,000 total damages less $50,000 workers' compensation benefits. The claimant still receives a net total of $500,000 in compensation.

to establish this fact is preserved by intervening in a civil action. If the civil action is resolved prior to entry of a verdict by the trier of fact, any resolution of the action by settlement or other means shall afford the employer or the workers' compensation insurer of the employer an opportunity to assert a right of subrogation, contribution, or implied indemnity if the employee-claimant's harm was not in any way caused by the fault of the claimant's employer or coworkers. This is a procedural safeguard to preserve the employer's right under this section to assert that he or she and the claimant's coworkers were in no way responsible for the claimant's injuries.

Section 305(e)(1) eliminates contribution and indemnity actions by third-party tortfeasors against the employer or coworker of the claimant, except as provided in section 305(f). A minority of jurisdictions allows a third-party tortfeasor, such as a manufacturer or product seller, to pursue a claim against the employer or coworker alleging that the employer or coworker was at fault and should pay all or part of the product liability judgment. Permitting a manufacturer to sue an employer for an employee accident undermines the workers' compensation principle that the employer or coworker should be immune from tort liability.

Section 305(e)(2) adds that the bill does not affect any other provision of State or Federal workers' compensation law prohibiting a person entitled to workers' compensation law prohibiting a person entitled to workers' compensation benefits from recovering for harm caused by a product in any action except a workers' compensation claim against an employer, coworker, workers' compensation insurer of the employer, or the exclusive representative of the injured person. Section 305(e) also states that the bill is not intended to affect any workers' compensation laws that permit claimants to recover on the basis of a claim of intentional tort by the employer or coworker. These intentional torts include, for example, assault, battery, trespass, or false imprisonment.

Section 305(f) provides that section 305(e) shall not apply and applicable State law shall control if the employer or the workers' compensation insurer of the employer, in a civil action subject to this title, asserts or attempts to assert, because of section 305(d), a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller.

Section 305 applies only to claims involving workplace injuries that are subject to State or Federal workers' compensation statutes. Therefore, where a product liability action involves a workplace injury covered by other laws, such as the Federal Employers Liability Act, 45 U.S.C. 51, section 305 does not apply. Section 305 only affects the rights of subrogation in product liability actions. This provision does not affect non-product-related subrogation claims, which frequently arise in such industries as the construction industry.

SECTION 306—SEVERAL LIABILITY FOR NONECONOMIC DAMAGES

In General

Section 306 provides that the liability of each defendant in a product liability action for noneconomic damages shall be several only and shall not be joint. Noneconomic damages, for the purposes of this section, are subjective, non-monetary losses, including pain and suffering awards. Each defendant shall be liable only for the portion of noneconomic damnage allocated to it in accordance with its proportionate share of responsibility. The basic policy underlying this section is to address inequitable application of the doctrine of joint and several liability that makes one defendant pay for the misconduct of another.

Joint and several liability was limited originally to situations where defendants had conspired with one another to harm a plaintiff—so-called "concert of action." Today, it has been extended far beyond its original application to situations where defendants' conduct played any role, however minor, in causing a harm. In such circumstances, the full implementation of joint and several liability can have inequitable consequences. When joint and several liability is applied, counsel for a claimant need not pursue a wrongdoer whose conduct played a principal role in causing the harm at issue so long as there is a larger "deep-pocket" defendant available. In those instances where certain defendants are not equipped to pay damages in proportion to their responsibility, the claimant can obtain the entire cost of that harm from the "deep-pocket" defendant even though its participation in the harm was relatively small.

This section takes a balanced approach to the problem by limiting the application of joint and several liability to situations where it is defensible on policy grounds—where a person's economic loss otherwise would be uncompensated. This distinction between economic and noneconomic loss is consistent with the underlying policy of joint and several liability to make the injured party whole. It does not preclude the claimant from being made whole for actual losses while limiting a defendant's liability for noneconomic losses to that portion for which the defendant is responsible.

The application of joint and several liability must be understood in the context of legal history. This doctrine holds one person responsible for another's conduct. It arose at common law in connection with procedural joinder of parties. At first, joinder was limited and was usually permitted when two or more defendants had conspired to harm a claimant—when they had engaged in "concert of action" by wrongfully pursuing a common scheme or plan that was likely to result in injury to another. Joint and several liability meant that the persons who acted in concert were equally at fault and jointly responsible for the harm; thus, the injured person could recover damages from any one of them.[167]

A growing number of States have abolished or modified the doctrine of joint and several liability.[168] In June 1986, those voting in

---

[167] *See* Statement of Alfred Cortese, May 10, 1990 hearing at 9–14, which provides a detailed history of the development of joint and several liability and indicates that the use of this doctrine has expanded well beyond its original intent.

[168] *Id.* at notes 37–39 and accompanying text.

a California State referendum approved an initiative measure to abolish joint and several liability with respect to noneconomic damages.[169] Section 306 is modeled on that initiative.

As Reported

Section 306(a) and (b) limit each defendant's liability for noneconomic damages to that defendants percentage of responsibility as determined by the trier of fact. The result is that, in any product liability action, the liability of each defendant for noneconomic damages shall not be joint and several.

In most cases the percentage determination required by this section will not be subject to an exact mathematical computation. Rather, it will be based on the common sense approximation assigned to it by the jury or by the court.

In determining the percentage of each defendant's liability, the trier of fact should take into consideration the proportionate share of each party's responsibility for the total harm caused, including that portion attributable to the claimant. The focus of the inquiry should be on the defendant's "responsibility." For example, if a defendant's share of responsibility for the harm is found to be 25 percent, that defendant is liable for 25 percent of the noneconomic damages.

Section 306 does not specify who has the burden of proof as to apportionment of noneconomic loss. Based on the evidence presented, the trier of fact should apportion responsibility among all parties.[170] All the parties will have an opportunity to present their case to the trier of fact as to the appropriate apportionment of responsibility, so that liability can be assigned based on that apportionment. The trier of fact shall make a determination as to apportionment without a requirement that any particular party "prove" which apportionment formula should be applied.

Responsibility should be apportioned for the purposes of this section among all persons who are parties to the action at the conclusion of the trial and persons who were parties to the action and have entered into settlement agreements with the claimant.[171] Courts should apply existing law with regard to the effect of settlement on the judgment and the settlor, but, for purposes of apportioning responsibility under subsection (b), the responsibility of the settlors who were parties should be included in the apportionment.

Section 306(c)(1) defines "noneconomic damages" for the purposes of section 308 and includes an illustrative, non-exhaustive list of examples.

Section 306(c)(2) provides that, for the purposes of this section, a product liability action includes "any action involving a claim, third-party claim, cross-claim, counterclaim, or contribution claim in a civil action in which a manufacturer or product seller is found liable for harm caused by a product." This subsection gives nonproduct liability defendants the protection of section 306 whether the product manufacturer or seller is an original party to the suit

---

[169] *Id.* at 16.

[170] *See* Prosser and Keeton on Torts, *supra*, section 52 at 348–351.

[171] *See* Uniform Comparative Fault Act, Section 2, 12 U.L.A. 39 (Supp. 1985); V. Schwartz, Comparative Negligence, *supra*, section 16.5 at 263–65.

or brought in through impleader. To make the point explicit, the Committee included the words "third-party claim" in subsection (b)(2).

Section 306 limits the doctrine of joint and several liability as applied to noneconomic damages in product liability actions. This section, however, does not preempt other limitations on joint and several liability with respect to economic damages, which have been imposed by individual jurisdictions. Indeed, a number of jurisdictions has enacted more sweeping reform with respect to joint and several liability.[172] These reforms are in no way affected by the Committee's action.

SECTION 307—DEFENSES INVOLVING INTOXICATING ALCOHOL OR DRUGS

In General

Section 307 establishes a complete defense for manufacturers or product sellers in actions subject to the bill, if the claimant was under the influence of intoxicating alcohol or any drug and such condition was more than 50 percent responsible for the accident or event that resulted in the claimant's harm. Barring liability in such cases is sound public policy. The use of intoxicating alcohol and drugs for non-medicinal purposes by a person creates serious risks to the safety of such a person and to the safety of others. For example, drunk driving is a major cause of death on our highways. A person who impairs his or her ability to act safely should not be able to shift the cost of such risks on to the manufacturer or seller of a product used by such person and ultimately on to society itself. This rule will encourage persons to take responsibility for their own safety and the safety of others.

The Committee has chosen the rule that would require that a claimant be more than 50 percent responsible so there would be no question as to the principal cause of the harm—alcohol or drug use. In order to avoid the inequitable shifting of liability on to other codefendants, such as municipalities, the Committee also has made section 307 applicable only in cases where manufacturers or product sellers are subject to liability and no liability exists against those codefendants who are not manufacturers or product sellers.

The State of Washington has enacted tort legislation that establishes a complete defense to an action for damages for personal injury or wrongful death, if the person injured or killed *was* under the influence of intoxicating liquor or any drug and such condition contributed more than 50 percent to his or her wrongful death.[173] This provision was included as part of Washington tort reform legislation that was enacted "in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance."[174] A provision of this nature is an important component of Federal product liability reform.

---

[172] *See note 168, supra.*

[173] Wash. S.B. No. 4630, Sec. 902 (enacted March 10, 1986). The Washington Statute specifies that "If the amount of alcohol in a person's blood is shown by chemical analysis of his or her blood, breath, or other bodily substance to have been 0.10% or more by weight of alcohol in the blood, it is conclusive proof that that person was under the influence of intoxicating liquor."

[174] Wash. S.B. No. 4630, Sec. 100.

The very strong public policy underlying this rule justified preemption of conflicting State laws—it is a national policy of overriding importance to the American public. Thus, if a State has pure comparative fault as its general rule of tort law this provision will prevail if claimant was under the influence of alcohol or any drug and such condition was more than 50 percent responsible for the harm. On the other hand, if a State retains the contributory negligence defense and believes that a person's claim should be barred if the person's fault in any way contributed to his or her harm, this bill is not preemptive. It only addresses situations in which, currently, a person could bring a successful claim when such person was more than 50 percent responsible due to drugs or alcohol.

As Reported

Section 307(a) provides that in any civil action subject to this bill in which all defendants are manufacturers or product sellers, such defendants may assert as a complete defense that the claimant was under the influence of intoxicating alcohol or any drug and that such condition was more than fifty percent responsible for the accident or event that resulted in such claimant's harm. This complete defense to liability for manufacturers of product sellers only applies in cases in which all defendants are manufacturers or product sellers, because otherwise the result might be to release manufacturers or product sellers from liability, while leaving, other defendants (such as municipalities) liable for the claimant's entire loss. While it is unjust for an intoxicated person who is primarily to blame for his or her own harm to recover in tort for his or her injuries, it would be still more unjust to release some defendants from liability in such a case while leaving others to bear the entire amount of damages.

Section 307(b) provides that in any civil action in which some, but not all, of the defendants are manufacturers or product sellers, and that the trier of fact determines that no liability exists against those defendants who are not manufacturers or product sellers, the court shall enter a judgment notwithstanding the verdict in favor of any defendant manufacturer or product seller, if it is proved that the claimant's intoxicated condition was more than 50 percent responsible for the accident or event which resulted in such claimant's harm. Thus, if a manufacturer or product seller was barred from invoking section 307(a) because of the presence of codefendants who were not manufacturers or product sellers, and those codefendants were not found to be liable, the manufacturer or product seller could still be released from liability pursuant to this provision.

Section 307(c)(1) provides that the determination of whether a person is under the influence of intoxicating alcohol shall be made pursuant to applicable State law. For example, if applicable State law provides that a particular amount of alcohol in a person's blood is evidence that the person was under the influence of intoxicating alcohol, that standard shall apply. Paragraph (2) of subsection (c) defines the term "drug" as any non-over-the-counter drug which has not been prescribed by a physician for use by the claimant.

Rollcall Votes in Committee

In accordance with paragraph (7c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 1400:

The Committee considered an amendment in the nature of a substitute offered by Senator Kasten. The Committee agreed, without objection, to considering the substitute as original text. At the close of debate of S. 1400, the Chairman announced a rollcall vote on the bill as amended. On a rollcall vote of 13 yeas and 7 nays as follows, the bill was ordered reported:

YEAS—13	NAYS—7
Mr. Inouye	Mr. Hollings
Mr. Exon	Mr. Ford
Mr. Rockefeller	Mr. Gore
Mr. Bentsen	Mr. Kerry
Mr. Robb	Mr. Breaux
Mr. Danforth	Mr. Bryan
Mr. Pressler	Mr. Packwood
Mr. Stevens	
Mr. Kasten	
Mr. McCain	
Mr. Burns	
Mr. Gorton	
Mr. Lott	

ADDITIONAL VIEWS OF MR. PRESSLER

I offer additional views only to underscore the need to move forward on this legislation sooner rather than later. Other industrialized nations have long since enacted producers liability reform. Our United States producers are at a real competitive disadvantage in the international marketplace, and our consumers and workers are paying the price.

This issue has been debated in the Commerce Committee for over a decade. Countless hearings have been held. We have reported legislation before, but we have yet to get to the President's desk with a bill. We are making progress. But, in my view, we have reached a critical juncture. It is time to act.

Four years ago in a Committee hearing on this subject, I borrowed from Georgetown University Professor John Wolff's comparative legal analysis to point out how other countries were far ahead of us in this area. The entire European Community has its product liability reforms in place. Japan, Germany, and others are far ahead of us on the legal curve in product liability law, as well. The point is that, as a result of our comparatively onerous product liability laws vis-a-vis our international competitors, the United States is at a severe competitive disadvantage in the international marketplace.

I recently spoke to a group of small businessmen on this issue. It was their number one concern. I was amazed at the extent to which they recognized the tremendous international trade implications of what we are doing in this legislation. Because we are so far behind our international neighbors, small businesses are being closed, workers are losing their jobs, and the products that do remain cost a great deal more for our consumers.

I believe very strongly in the citizen's right to bring suit. We need a viable civil justice system to prevent corporate abuses and assure product safety. That is retained in this legislation.

Additionally, I am very pleased that the legislation passed by the Committee includes the substance of the joint and several liability amendment I offered successfully to the last bill we passed out of this Committee. I believe that is a very important element which must be retained as we go forward in the legislative process.

So again, I urge simply that we move forward in a more expeditious manner to bring this much needed legislation to its final conclusion. A decade of debate and controversy and compromise has led to a very carefully crafted solution. It is time for enactment.

LARRY PRESSLER.

MINORITY VIEWS OF MR. HOLLINGS

INTRODUCTION

In the past, I have urged my colleagues to reject Federal product liability laws as unwise Federal legislation. Since then, the proponents of this legislation have had many years to make their case, and they have failed to do so. They have offered many reasons in support of the bill, but an extended examination of the facts demonstrates more than ever that this legislation is unwise.

This measure would federalize an area of law that always has been the province of the States. Such an action should never be undertaken lightly. Those who propose such dramatic change through the legislative process, at a minimum, should bear the burden of proving that such change is both warranted and likely to be effective. Unfortunately, the Committee has ordered this bill reported without requiring anything close to a demonstration that either factor is present. On the contrary, the factual record clearly demonstrates that each stated basis for this legislation cannot withstand even minimal scrutiny.

In fact, the stated basis for this legislation is a constantly moving target. A new reason that this bill is necessary is suggested each year; however, when the facts are examined, each new reason evaporates when exposed to the light of day and to the objective facts.

The Committee's work on this issue has demonstrated that there is no litigation explosion; that the insurance crisis (which has now ended) was not due to product liability; that the current system generally works properly to fairly compensate injured victims; that the competitive position of U.S. business is affected very little, if at all, by product liability; and that products kept off the market by product liability concerns are not necessarily safe, innovative products, but rather are examples of the product liability system deterring unwarranted risks to consumers. Each of the issues discussed above has been the basis, over the years, for the almost frenzied cry for Federal product liability law, but none of them withstands scrutiny.

This year, "competitiveness" is the buzzword on which the legislation is based. We are asked to pass this legislation to make U.S. business more competitive in world markets. But these are the facts: less than 1% of the price of products is attributable to product liability; in its February 1990 study of competitiveness, the Office of Technology Assessment (OTA) does not list product liability as a primary problem for U.S. manufacturers competing in world markets; this bill will not reduce product liability claims or insurance costs; our competitors in the European Community are moving toward a product liability system more like ours, which appropriately reflects the need for consumer protection; and the General Accounting Office (GAO) says that this bill will not reduce

transaction costs, but actually could increase them. The facts show that product liability is not the cause of competitive problems, nor is this bill the cure.

The proponents of S. 1400 have represented that this bill is not as draconian as earlier Federal product liability measures, and will not impact as drastically on consumers. First, it should be noted that, despite efforts to characterize this as a bill that will impact similarly on plaintiffs and defendants, in most areas it changes only the laws of the states that currently favor plaintiffs. In addition, many of the substantive provisions of this bill are unwise or unworkable and the bill is riddled with ambiguity and conflicts for court practice and procedure. We should not misunderstand the purpose of this bill.

Even if one were to agree that this bill is not as severe as other measures, this bill gives me little comfort in any event, since the primary effect of this or any such measure would be to begin the federalization of product liability law. Once that process has begun, Congress will never hear the end of the clamor for additional changes in this law, and will be spending an ever-increasing portion of its working time on this issue. Moreover, this bill is not cast in stone until its enactment into law, and the call for changes has begun. The Administration and others are already seeking more stringent amendments.

Supporters of this bill sometimes suggest that its only enemies are trial lawyers. It is important to note who the opponents of this bill *really are.* This bill is opposed by every major consumer organization, a wide range of health organizations, the American Bar Association, the National Conference of State Legislatures, and the Conference of State Supreme Court Justices. These are the experts in health, consumer protection, and legal jurisprudence. They are concerned not with fees, but with product safety, justice and the proper functioning of the legal system. So it is not just the trial lawyers who are concerned about the bill's effects.

We are being asked to enact legislation when there has been no credible demonstration that there is a problem that will be addressed by that legislation. At the same time, enactment of such a law would alter, in one stroke, the fundamental federalism inherent in this country's tort law, and would add to the difficulties already faced by the victims of defective products.

I yield to no one in my desire to assist American business in every way, and to insure its viability in ever-changing world markets. However, I urge my colleagues to insist, at a minimum, on some objective demonstration that federal product liability law is a reasonable means to address the real problems faced by the business community. We have not yet seen such a demonstration, and in my view the legislative process is ill-served by taking such dramatic action in these circumstances. Legislative proposals of this type have been much ado about nothing for over a decade, but the "much ado" has been a considerable drain on the limited resources of the Congress. We have very limited time, and we must insure that it is spent on work that can be most productive for the nation. It is time to recognize where the burden of proof on this issue lies, to recognize that it has not been met despite ten years of work, and

to turn the resources of the Committee and the Senate to work on other more useful matters.

In the discussion below, I will set out in more detail the facts that have been developed on this issue. These facts demonstrate why we should not move forward on this bill.

THE FACTS

THE CURRENT SYSTEM IS NOT BROKEN, AND DOES NOT NEED FIXING

The Current System Achieves Fair Results, and There Is No "Explosion" of Litigation

Before we make dramatic changes in product liability law, we, at the least, should have information to demonstrate that the current system needs fixing—that it is not achieving its purpose of fairly and properly compensating victims of defective products, and of deterring the marketing of unsafe products. As each additional piece of objective data becomes available, it becomes more clear that the current system is working.

GAO recently completed one of the first extensive reviews of data related to State court product liability cases.[1] Since most product liability cases are ligitated in state court, and most of the past data has been only from the federal courts, this report is very significant. GAO found that the size of compensatory awards varied by type and severity of injury in a manner consistent with underlying economic loss, so that compensatory awards were neither erratic nor excessive.[2] It further found that plaintiffs won fewer than 50 percent of the cases litigated, that awards were based on negligence in almost three-quarters of the cases (even in the states that permit recovery based on strict liability without a demonstration of negligence), and that the amount of punitive damages awarded was highly correlated with the size of compensatory damages.[3]

Another significant research effort only recently completed concludes that, even if product liability cases could be characterized as unfairly favoring plaintiffs in the past, the current trend is clearly favoring defendants. Professors James A. Henderson, Jr. and Theodore Eisenberg of Cornell Law School performed an extensive study of all reported product liability decisions and found a "quiet revolution . . . away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs' rights to recover in tort for product-related injuries." [4] Specifically, they found that in 1976 and continuing to 1983, defendants benefitted in roughtly 51% of product liability cases. By 1988, the figure had risen by 12.2%, so that defendants prevailed in 63.4% of product liability cases.

---

[1] U.S. General Accounting Office, "Product Liability: Verdicts and Case Resolution in Five States," GAO/HRD-89-99 (September 1989). Hereafter referred to as "1989 GAO Report."

[2] *Id.* at 27.

[3] *Id.* at 29-31.

[4] Henderson and Eisenberg, "The Quiet Revolution in Products Liability: An Empirical Study of Legal Change," 37 U.C.L.A. Law Review 479, 480 (1990).

Similarly, both GAO [5] and Rand Corporation [6] studies have indicated that, despite increases in absolute numbers of federal product liability filings during the 1970s and 1980s, the data does not support the suggestion, made in past years, that there is an "explosion" of product liability cases from which business must be protected. Rather, GAO found that one product, asbestos, accounted for approximately 60% of the growth in filings between 1976–1986.[7] GAO further found that, since 1981, product liability cases have grown at about the same rate as other civil filings and at the same rate as personal expenditures on goods, with growth of product liability cases at 4%, personal expenditures on goods at 4%, and civil filings at 6%.[8] The author of the Rand study has stated that "[m]y feeling is that the available evidence doesn't support the notion that products liability is crippling American business." [9]

Professor Lawrence Mann from Wayne State University Law School performed a similar study for the Governor of Michigan in 1988–89. He began by noting that ". . . much of the debate surrounding products liability litigation has been based upon anecdote and intuition. Hard data describing the products liability litigation landscape are scarce." He conducted his research by surveying over 2,000 businesses as well as attorneys of record in closed cases for the year 1987. His general conclusion was that "[v]erdicts and settlements in products liability cases are not erratic and appear reasonably related to economic losses sustained and injury severity." [10]

His research found a "phenomenal concentration of litigation among a handful of defendants who are 'repeat players' in civil litigation." In 1987, 4 companies accounted for 92% of the cases filed. In 1982, 4 companies accounted for 91% of the cases filed, and in 1979, 4 companies accounted for 83%.[11]

Professor Mann concluded that ". . . fewer and fewer litigants are accounting for an increasing share of the litigation pie." He further found that ". . . the distribution of cases filed for the years covered in the . . . survey yield a picture of products litigation that is inconsistent with the conclusion that the business community in general is the victim of a products liability explosion." [12]

Additionally, according to one study by the Insurance Services Office, approximately 73 percent of the bodily injury claims and 83 percent of the property damage claims are settled without the filing of a lawsuit. Only 3.5 percent of claims go all the way to a court verdict, and in those cases, fewer than 25 percent of defend-

---

[5] U.S. General Accounting Office, "Product Liability: Extent of 'Litigation Explosion' in Federal Courts Questioned," GAO/HRD-88-36BR (January 1988).

[6] Dugworth, "Product Liability and the Business Sector: Litigation Trends in Federal Courts," Rand Corporation, The Institute for Civil Justice, R-3668-ICJ (1988).

[7] GAO Report, *supra*, note 5.

[8] *Id.* at 32, 43.

[9] Wall Street Journal, "Survey Questions Liability Crisis at U.S. Companies," January 18, 1989.

[10] Testimony of Professor Lawrence C. Mann, Wayne State University School of Law, Consumer Subcommittee Hearing on S. 1400, 2/22/90, statement at 1-2.

[11] *Id.*, at Report to the Governor of Michigan at 2.

[12] *Id.*, at Report to the Governor of Michigan at 1, 2.

ants are found liable. Thus, according to this study, 96.5 percent of product liability claims are resolved before the verdict.[13]

Much has been made of the unpredictability of results in product liability trials, and it has been stated that most of this is due to our jury system.[14] I cannot believe any of my colleagues want to tamper with that system. When a product liability case goes to trial, the jury is not impaneled for the purpose of giving away someone else's money. Rather it is charged with the administration of justice. These juries are composed of our friends and neighbors, who conclude, some of the time, that the defective products involved and the injuries sustained require compensation. And it is our friends and neighbors—who work for a living and know the value of a dollar—who occasionally conclude that punitive damages are justified when the defendant has engaged in outrageous behavior.

By reviewing the data representative of the entire system, as opposed to the few anecdotes of high damage awards often cited by the supporters of this bill, we can see that the system is not out of control in terms of numbers of cases filed or amount of compensation awarded. There is no evidence of a problem that outweighs the beneficial aspects of the current system that stand to be undermined if this bill is enacted.

The Current System Promotes Product Safety

One of the primary effects of the current system is to promote product safety—to make manufacturers more careful in the design and production of their products. We know this because manufacturers themselves have told us. The 1987 Conference Board survey of risk managers of corporations found that "[w]here product liability has had a notable impact—where it has most significantly affected management decision making—has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit." [15]

Indeed, according to the Consumer Federation of America (CFA), only a small minority of companies had a product safety management position in the early 1970s. By the end of the 1970s, virtually all companies had a very strong product safety presence in their management structure. CFA further stated that there has been a dramatic change in the rate of accidental injuries and deaths in the United States, so that "approximately 6,000 deaths and millions of injuries have been prevented on an annual basis now because of product liability and other forces towards greater safety in our society." [16]

---

[13] *See* Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results at 95 (1977); 1986 Hearings on Product Liability, before the Consumer Subcommittee, 99th Cong. 2nd Session (Statement of the Public Citizen's Congress Watch, Consumers Union, U.S. Public Interest Research Group, Consumer Federation of America).

[14] *See* Testimony of Peter Huber, Consumer Subcommittee Hearing on S. 1400, 4/5/90, transcript at 119, 141; testimony of Professor Mark Hager, Consumer Subcommittee Hearing on S. 1400, 4/5/90, transcript at 137-8.

[15] Weber, "Product Liability: The Corporate Response," The Conference Board, Report No. 893 (1987) at 2.

[16] Testimony of Gene Kimmelman, Legislative Director, Consumer Federation of America, at Consumer Subcommittee Hearing on S. 1400, 4/5/90, transcript at 77-78.

Greater product safety impacts not only on consumer protection, but also on competitiveness. As Professor Mark Hager of American University testified.

> . . . our products, because of their superior reputation for safety, due in part to the effects of product liability over the last 20 years, have a superior reputation in the international marketplace. . . . [W]e cannot compete at this time with the low labor costs of newly industrializing countries, but we can compete very effectively . . . in safety, and it would be a grave risk to our international competitiveness to toy with the tort system that helps bring about that competitive advantage.[17]

The Current System Promotes Important Principles of Federalism

The value of the principles of federalism embodied in our current system of tort law should not be overlooked. As Representative Mike Box, of the Alabama House of Repesentatives, has testified:

> [t]he issues of proper compensation for injured persons and suitable protections for businesses are matters of social values and public policy that should be addressed at the state level, in the absence of a national economic crisis. . . . Arguments for uniform laws as a means of promoting competitiveness ignore the advantages of a decentralized and federal system of civil justice. . . . Remember why we developed as a federal nation. . . . Our founding fathers recognized the importance of having governments resonsive to the electorate. Broad powers were reserved to the states so they would serve as bulwarks of freedom, an antidote to an overpowerful national government. . . . S. 1400 is radical because it opens the door to substantially greater federal intrusions.[18]

Professor Eisenberg from Cornell Law School echoed these concerns, and pointed out the practical problem with federal tort law that I believe should provoke serious concern.

> The changing nature of products liability law make me cautious about wishing for Congress to implement a single rule. For the rule Congress adopts had better be a good one, since it may preempt further experimentation and change by the states. I see no basis for believing that the rules embodied in S. 1400 are superior to the collection of rules embodied in various state laws and to the ability of the states to adopt the best rules of their sister states, as those rules evolve over time. The one thing we do know is that state product law does change. I worry that Congress

---

[17] Testimony of Professor Mark Hager, Assistant Professor of Law, Washington College of Law, American University, at Consumer Subcommittee Hearing on S. 1400, 4/5/90, transcript at 126.

[18] Testimony of Representatives Mike Box, Alabama House of Representatives, at Consumer Subcommittee Hearing on S. 1400 4/5/90, statement at 1-3.

> may freeze the law with the wrong set of rules at a time when there is no clear reason to [do so].[19]

I have the same concern. I am constantly surprised that some are willing to take their chances with Congress setting the rules over the long haul. Such an effort would limit flexibility, and could eventually result in rules more oriented toward plaintiffs then those the states would craft. In any event, we only should tinker with the fundamental principles of federalism in the most extreme circumstances—a record such as we have on this issue is insufficient.

The Current System Did Not Cause The Insurance "Crisis"

In past years, the cry for product liability law has been based on a "crisis" in the availability and price of insurance. That argument has become non-existent, since virtually everyone agrees that insurance is now generally available and well-priced—we are in a "soft" market.[20] Even before that occurred, however, it was clear that the product liability system was not responsible for insurance availability problems.

The primary allegations concerning the existence and magnitude of this crisis have proved vastly exaggerated. In 1976, the Federal Government created a Federal Interagency Task Force on Product Liability (hereinafter the Task Force) to examine the problem. The Insurance Study commissioned by the Task Force found that, while insurance costs did increase in the mid-1970s, insurance premiums exceeded 1 percent of the total sales for only three industries.[21]

By 1983, evidence indicated that product liability insurance costs had stabilized or decreased, and that the insurance crisis had disappeared. A 1983 Institute for Civil Justice study concluded not only that reports of a product liability crisis in the mid-1970s were greatly exaggerated, but that even the perception of a crisis had receded because it had become evident that product liability claims had not imposed unreasonable costs on most manufacturers.[22] Costs increased and availability decreased again in the mid-1980s.

The increases in product liability insurance costs were a result not of product liability but of the cyclical nature of the insurance industry and the industry's ratemaking practices. The Congressional Research Service (CRS) has described the repeating cycles of high and low premiums as an historical alteration between soft and hard insurance markets, and has discussed the management practices of the companies which contribute to this cycle. In a soft market, rates are adequate, and risk selection careful, and the industry generally performs well. New capital is attracted from a

---

[19] Testimony of Professor Theodore Eisenberg, Professor of Law, Cornell University, in response to post hearing questions of Senator Rockefeller, record of Consumer Subcommittee Hearing on S. 1400 4/5/90, at 2.

[20] *See* Testimony of J. Robert Hunter, President, National Insurance Consumers Organization, Consumer Subcommittee Hearing on S. 1400, 4/5/90, transcript at 133-4; testimony of Deborah Ballen, Vice President, American Insurance Association, Consumer Subcommittee Hearing on S. 1400, 4/5/90.

[21] U.S. Department of Commerce, Interagency Task Force on Product Liability, Final Report VI-20 (1977) [hereinafter cited as Task Force Final Report].

[22] Rand Corporation, The Institute for Civil Justice, "Designing Safer Products: Corporate Responses to Product Liability Law and Regulation" at 121 (1983) [hereinafter cited as Designing Safer Products].

number of sources and capacity increases. Price cutting of premiums results when new sources of capacity begin to generate increased competition for available premium volume. Underwriting standards (the standards for deciding whether to insure a particular manufacturer) for risk selection diminish with increased competition, and insurers take on riskier business endeavors. According to CRS, this practice results in rising claims losses.

At the point that competition is severe and losses are too high, insurers withdraw from the market and the capacity shrinks, resulting in a hard market. Availability and affordability problems ensue as the remaining insurers raise prices and tighten the underwriting standards. Eventually the market stabilizes, a soft market emerges, and the cycle begins again.[23]

Interest rates, which reached historic heights in the late 1970s, aggravated the cycle. Companies engaged in price wars in order to obtain a larger volume of premium income for investment.[24] Basically, companies were willing to accept lower premiums for certain insurance lines in order to encourage sales and obtain funds for investments.[25]

On February 19 and March 4, 1986, the Senate Commerce Committee held hearings to conduct a more comprehensive examination of the availability and cost of liability insurance. Testimony was presented at hearings on the reasons for the insurance crisis. Witnesses noted that the insurance crisis has arisen during a period of falling interest rates, prior to which competing insurance companies had been underpricing their product in order to maximize cash flow and enhance investment income. When interest rates began to fall, companies were forced to increase premiums because investment income was no longer compensating for underwriting losses. The Committee Report accompanying S. 2129, the Risk Retention Amendments of 1986, states that "[t]his practice of cash flow underwriting was linked directly to the current crisis."[26]

GAO testified in May 1986 before the Consumer Subcommittee that the underwriting cycle turned again and "is now moving in a positive direction." The property/casualty industry will enjoy "an expected net gain before taxes of more than $90 billion over the years 1986–1990."

GAO also found a profitable industry over the last ten years, stating that "the property/casualty companies have used a pricing strategy which sacrificed underwriting profit margins in order to generate cash for investment purposes. As a result of the strategy, the property/casualty industry has made between $52 and $79 billion in net gains over the last ten years."[27]

It is clear that the insurance industry has been through several financial cycles, but the evidence shows that the product liability system was not a factor in those cycles. The irony of the continuing

---

[23] *See* Congressional Research Service, "Property-Casualty Insurance Market Operation", CRS Report No. 85–629E (March 20, 1985).

[24] *See* "A Rate War Rips Casualty Insurers," Business Week, December 8, 1980.

[25] Hearing on Product Liability before the Consumer Subcommittee, 99th Cong. 2d. Sess. (1986) (hereafter cited as 1986 Product Liability Hearing). (Statement of Johnny C. Finch, Senior Associate Director, General Government Division General Accounting Office).

[26] S. Rep. No. 294, 99th Cong., 2nd Sess. 4 (1986).

[27] 1986 Hearing on Product Liability, *supra*, note 25 (Statement of Johnny C. Finch, Senior Associate Director, General Government Division, General Accounting Office).

debate over a Federal product liability bill is that insurance costs were emphasized by the proponents as the reason for passage of a Federal product liability bill in the 96th and 97th Congresses when premiums were high, and were deemphasized as a reason for passage of product liability legislation during the 98th Congress when insurance premiums were reduced. In the 99th Congress, the proponents again pointed to the high premiums as a justification for a Federal bill, but these arguments have disappeared in the 101st Congress, at a time when the insurance industry is stable. The inconsistency in this argument of the bill's proponents further supports the conclusion that the current liability system does not dictate the state of the insurance industry.

COMPETITIVENESS AND INNOVATION—PRODUCT LIABILITY IS NEITHER THE CAUSE OF ANY PROBLEM NOR THE BASIS FOR ANY CURE

Competitiveness

1. *Product liability is not a major factor in the competitiveness of U.S. business.*—This year's stated reason for this legislation is that product liability inhibits the ability of U.S. business to compete in world markets and to market innovative products. The facts are to the contrary. Study after study indicates that this assertion is baseless.

OTA has recently completed a study of the competitiveness of U.S. manufacturers.[28] The study concluded that American manufacturing clearly is being challenged by competitors, particularly from Japan, and that there is no single solution. However, the recommended policy options for government activity to address this challenge did not include Federal product liability law. Rather, OTA listed as the four most important steps that the United States could take to improve competitiveness: (1) lower the cost of capital; (2) improve the quality of human resources through education and quality of workforce; (3) improve the diffusion of manufacturing technology to small and medium-sized business; and (4) government funding of risky but promising long-term research and development.[29]

Additionally, in 1987, the Conference Board surveyed the risk manager of 232 major U.S. manufacturing, trade and service corporations about the effect of product liability on their companies.[30] Risk managers are the corporate employees that have the greatest corporate responsibility for addressing product liability issues—40% of the responsibility, as compared to 6% of the responsibility by the Chief Executive Office (CEOs).[31] Two-thirds of the risk managers said tht product liability contributed 1% or less to the final prices of their products. For another 11% of the companies, the liability cost was only 2-3% of the final price.[32] Significantly, most

---

[28] U.S. Congress, Office of Technology Assessment, "Making Things Better: Competing in Manufacturing," OTA-ITE-443 (Washington, D.C.: U.S. Government Printing Office, February 1990).

[29] Testimony of Dr. Julie Fox Gorte, Office of Technology Assessment, Consumer Subcommittee Hearing on S. 1400, 4/5/90, at transcript pp. 61-2.

[30] Weber, "Product Liability: The Corporate Response," The Conference Board, Report No. 893 (1987).

[31] *Id.* at v.

[32] *Id.* at 13.

of the companies surveyed said that the area in which product liability had most significantly altered management decision making was in improving the quality of the products themselves.[33]

GAO made similar findings in a 1988 report on the issue.[34] GAO found that insurance costs represented a relatively small proportion of businesses' annual gross receipts—0.6% for large businesses, and about 1% for small businesses.[35]

The Insitute for Civil Justice of the Rand Corporation concluded in 1983 that product liability costs in most cases were a minute percentage of costs to business:

> It appears safe to conclude that for most large manufacturing firms, product liability costs—including the cost of defending litigation and certain product liability prevention activities—probably amount to much less than 1 percent of total sales revenue.[36]

In fact, the Rand Corporation has found that only a small percentage of U.S. manufacturers are even involved in product liability litigation. In 1986, only 0.9% of all manufacturing concerns in the U.S. were defendants in product liability litigation.[37]

The only discordant note in the general agreement that product liability has a very small impact on business comes from a 1988 Conference Board survey of 500 chief executive officers of corporations, 42% of whom stated that product liability had a major impact on them.[38] Some components of the Conference Board apparently were dissatisfied with the results of the earlier survey in 1987, cited above, which did not support their theory of product liability. So they decided to ask different people, in hopes of a different result. This is virtually the only piece of information cited by the supporters of this legislation for the proposition that product liability affects competitiveness.[39]

However, as Professor Theodore Eisenberg of Cornell Law School has stated with respect to this survey, ". . . the case for reducing defendant liability seemed rather weak. It depended in large part on a survey of CEOs in which they were asked whether products liability was a problem for their companies. The flaws in such a survey are so substantial and obvious that no self-respecting legislature should act on the basis of the results." [40] I could not have said it better myself. We cannot responsibly move forward on this legislation based on a self-serving survey of corporate executives, particularly when it is contrary to all other data. The data demonstrates that the actual impact of product liability on businesses' bottom line is very small.

---

[33] *Id.* at 2.

[34] U.S. General Accounting Office, "Liability Insurance: Effects of Recent 'Crisis' on Businesses and Other Organizations," GAO/HRD-88-64 (July 1988).

[35] *Id.* at 5.

[36] Designing Safer Products, *supra*, note 22, at 121.

[37] Dugworth, "Product Liability and the Business Sector: Litigation Trends in Federal Courts," *supra*, note 6, at 53-56.

[38] McGuire, "The Impact of Product Liability," The Conference Board, Report No. 908 (1988).

[39] *See, e.g.*, Testimony of Wendell Willkie, General Counsel, Department of Commerce, Consumer Subcommittee Hearing on S. 1400, 2/22/90.

[40] Responses of Professor Theodore Eisenberg, Professor of Law, Cornell University, to post-hearing questions of Senator Rockefeller, in record of Consumer Subcommittee Hearing on S. 1400, 4/5/90, response to question 1.

With respect to the world market, when the debate on this bill first began in this Congress, the supporters declared that the product liability system must be changed because of the changes taking place in the European Economic Community (EEC). It was argued that the EEC was moving toward a uniform product liability system, and that the United States must do the same. It also was argued that other countries in the world had lower product liability costs than the United States, implying that this country should somehow emulate those other systems. However, like so many arguments on this issue, when the facts were examined, the argument disappeared.

The Council of the European Communities issued a directive in 1985 "concerning liability for defective products," [41] which included an August 1, 1988, compliance deadline. However, only 5 member states—the United Kingdom, Italy, Greece, Luxembourg, and Denmark—had adopted the Directive as of March 15, 1990.[42] More significantly, the Directive by its terms does *not* preempt existing law in the various countries, but merely provides an additional cause of action in those countries in which remedies for harm already exist, and therefore is not likely to establish a more uniform system. As Professor Lawrence Mann of Wayne State University School of Law testified, "[the Directive] is not in derogation of each member state's substantive tort law. And so, side by side, they will have a dual system operating." [43] Additionally, while the Directive establishes certain rules of law, it leaves many issues optional with the member states.[44]

Equally interesting, it is apparent that the EEC is moving toward a system of substantive product liability that is more consumer-oriented than that which is currently in place, and more likely that in the United States. For example, its Directive introduces the concept of strict liability for defective products,[45] expands the scope of potential defendants,[46] and institutes joint and several liability.[47] Since product liability is being expanded, insurance premiums are likely to go up, with an accompanying significant additional cost for producers in the EEC.[48]

Thus, rather than the EEC Directive providing an incentive for changing U.S. product liability law, it is instead a recognition of the value of current U.S. law in protecting consumers and promoting safe products. I do not believe we should sacrifice the greater degree of consumer protection we enjoy for some unsubstantiated hope of greater competitiveness.

It also has been argued that product liability costs are much higher in the United States than in the countries of some of our

---

[41] 28 O.J. Eur. Comm. (No. L 210) 29 (1985) (hereafter cited as "Directive").

[42] Letter of Robert C. Holland, Committee for Economic Development, to Senator Richard Bryan, Chairman, Consumer Subcommittee, dated March 15, 1990, in response to post-hearing questions at 1. Printed in record of Consumer Subcommittee Hearing on S. 1400, 2/22/90.

[43] *See* Directive, Article 13; Testimony of Professor Lawrence D. Mann, Wayne State College of Law, Consumer Subcommittee Hearing on S. 1400, 2/22/90, transcript p. 167.

[44] *See, e.g.,* Dielmann, "The European Economic Community's Council Directive on Product Liability," *The International Lawyer,* Vol. 20, No. 4, 1391 at 1400 (1986).

[45] Directive, Article 1.

[46] Directive, Article 3. *See also* Theiffry, Doorn, and Lowe, "The Single European Market: A Practitioner's Guide to 1992," 7 B.C. Int'l & Comp. L. Rev. 357 at 383.

[47] Directive, Article 5. *See also,* Thieffry, Doorn and Lowe, *supra,* at 383.

[48] Dielmann, *supra,* at 1399.

foreign competitors. However, a direct comparison of the costs of the tort systems in various countries, without more, is not valid because it ignores other types of compensation systems available in other countries. For example, in the Netherlands several social insurance programs are available which may preempt the need for compensation through the litigation process—the ZW/Sick Statute; the ZFW/Sick Fund Law; the WAO/Workers Disability Act of 1967; the AAW/General Act on Disability of Work; and the AWBZ/General Act on Special Medical Costs. The ZW is funded by collecting 5% of employers' gross income and 1% of employees' gross income. An injured employee may receive up to 70% of earned wages for 1 year. AAW and WAO continue funding if further assistance is needed.[49] Thus, while business' costs related directly to the tort system may be lower in other countries, the relevant comparison is with the overall cost of compensation, which is likely to be similar to that in the United States.

It is clear that the facts do not support this contention that the current product liability system puts American businesses at a competitive disadvantage. If we are going to legislate to assist American business, we should do it in a way that will be effective, and S. 1400 will not.

2. *S. 1400 will not reduce product liability costs for business*

Even if we assume for the sake of discussion that product liability is a significant barrier to the ability of U.S. firms to compete in world markets, that barrier cannot be reduced by any legislation unless the legislation somehow reduces businesses' costs. The Committee received virtually unequivocal testimony that enactment of S. 1400 will not have any such effect.

First, the insurance industry testified before the Committee in no uncertain terms that ". . . the bill is likely to have little or no beneficial impact on the frequency and severity of product liability claims. . . . [I]t is not likely to reduce insurance claim costs or improve the insurance market." [50]

In fact, regardless of the scope of the product liability legislation enacted, the record indicates that it will be ineffective in reducing product liability insurance costs. For example, Florida passed very strong changes in its tort law in 1986, and also required the insurance industry to make rate filings indicating the effect of the changes on its rates. The Florida law eliminated joint and several liability, limited noneconomic damages to $450,000, and limited punitive damages. Nevertheless, when Aetna's rate filing came in, it listed the effect of each change on its rates as "zero." [51] There was no change in insurance costs, despite the dramatic changes in tort law, and we could expect none with enactment of S. 1400.

No explanation has been offered, and none could logically be offered, for any way in which a bill could improve competitiveness if it does not reduce product liability claims or costs. As J. Robert Hunter, President of the National Insurance Consumer Organiza-

---

[49] Mann and Rodrigues, "The European Directive on Products Liability: The Promise of Progress?" 18 Ga. J. Int'l & Comp. L. 391, 416.

[50] Testimony of Deborah T. Ballen, Vice President for Policy Development and Research, American Insurance Association, at Consumer Subcommittee Hearing on S. 1400, 4/5/90, transcript p. 110.

[51] Testimony of J. Robert Hunter, *supra*, note 20, transcript at 135.

tion, testified, "[m]ake no mistake about it, if insurance costs and availability are not improved, competitiveness is not affected." [52]

When this is pointed out, the supporters of the bill often fall back on "transaction costs," and suggest that the bill may not reduce damages paid but will reduce transaction costs, or the costs of litigation such as attorneys' fees. Of course, if transaction costs were reduced, they should be reflected in reduced insurance costs, and insurance costs will not be reduced by this bill. In any event, the available evidence demonstrates that the bill will not reduce transaction costs either.

GAO has stated unequivocally:

> [w]e believe that S. 1400 is unlikely to reduce transaction costs in product liability suits. For cases that are litigated, the procedural features of the tort system would not be changed by the bill. It is also not clear that the bill provides strong incentives for alternative dispute resolution, which could cut litigation costs. Moreover, the alternative dispute resolution mechanisms that may be used are left to the discretion of the states. If these mechanisms are not binding, then they may add to rather than substitute for litigation. If this happened, costs could actually increase.[53]

GAO went on to note that transaction costs are largely a function of the length of litigation, and that delays caused by defendants are common. However, if a complete and accurate record is necessary to insure a fair outcome of the case, "lengthy litigation and its attendant costs might be justified." [54]

One justification offered for Federal product liability legislation in that legal fees paid to plaintiffs' attorneys are too high. However, this bill would not have any effect on attorneys fees. In any event, it is important to understand the value of the current system of compensation for plaintiffs' attorneys. Plaintiffs' lawyers who accept product liability cases work on a contingency fee basis. If they win the case they get a percentage of the case (which is usually about 30 percent); if they lose, they get nothing. This system allows injured plaintiffs who are not wealthy to obtain a lawyer. At the same time, the system acts as a deterrent to frivolous cases because attorneys are spending their own time and money in the case.

Figures from the Institute for Civil Justice state that plaintiffs receive approximately one-half of the cost of litigation.[55] Any problem with the cost of the system is not with the cost of the attorney who is "investing" his or her own time and money to win a case. The problem is with the defense attorney who has an incentive to delay the case with dilatory motions, and thereby encourage severely injured plaintiffs to settle for less in order to get a expedited payment of the plaintiff's medical and other costs. Meanwhile, the

---

[52] Testimony of J. Robert Hunter, Id., transcript at 132.

[53] Testimony of Joseph F. Delfico, Director, Income Security Issues, General Accounting Office, Consumer Subcommittee Hearing on S. 1400, 2/22/90 in response to post-hearing questions of Senator Bryan at 2.

[54] *Id.* at 2-3.

[55] Hearing before the Subcommittee on Trade, Productivity and Economic Growth of the House Joint Economic Committee, 99th Congress 2d Sess. (1986) (Statement of James S. Kakalik).

company is making interest on money that would otherwise be in the hands of the prevailing plaintiff.

Moreover, defendants' attorneys are apparently better paid, on average, than plaintiffs' attorneys. According to calculations derived from a 1977 survey conducted by the Insurance Services Officer, for every dollar paid to claimants, insurers paid an average of an additional 42 cents in defense costs, while for every dollar awarded to a plaintiff, the plaintiff pays an average contingent fee of 33 cents out of that dollar.[56] Thus, in cases in which plaintiffs prevail, out of each $1.42 in total litigation costs (including damages), about half of that goes to attorneys fees, with defendants' attorneys, on average, paid better than plaintiffs' attorneys. Of course, defendants' attorneys are paid regardless of the outcome of the case, while plaintiffs' attorneys are paid only if they win their case. Otherwise, they take a loss for the time and expenses they have incurred. Thus, existing transaction costs are not inappropriate, and in any event would not be reduced by this bill.

The facts lead to the conclusion that no reduction in costs will occur through changes in the current tort liability system, and thus that no competitive advantage for American business can result.

Innovation

1. *The current system does not discourage safe new products.*—The other theme sounded in support of the bill this year is that the current system deters innovation, and discourages new products from being brought to market. Of course, this effect is, by its nature, somewhat subjective and very difficult to examine. A company can, and often does say it is discouraged from bringing an innovative product to market, but it may not say what that product is, so the claim cannot be analyzed. However, the actual products that have been cited in support of this claim subsequently had questions raised about their safety. In such cases, until those questions are resolved, I do not think we should presume that the product liability system has not worked properly to keep those products from the market. Some examples of products cited as unfairly kept from the market by the system are set out below, together with the responses made during the Committee's hearing process.

Monsanto Asbestos Substitute: Calcium sodium metaphosphate was cited as a primary example of a safe product kept from the market by the product liability system. However, an Environmental Protection Agency (EPA) Status Report dated August 19, 1986, reviewed studies of this product submitted by Monsanto, and stated that "EPA believes that the evidence obtained from Monsanto's . . . study in rats offers reasonable support for the conclusion that calcium sodium metaphosphate fibers can cause cancer." (Report p. 9). Dr. Philip Landrigan, Chairman, Department of Community Medicine, Mt. Sinai Medical Center, reviewed the EPA and Monsanto documents, and stated that: "I am extremely concerned about the potential carcinogenicity of sodium calcium metaphos-

[56] S. Rep No. 476, 98th Cong., 2d Sess. 7 (1984) (citing Insurance Services Office, "Product Liability Closed Claim Survey: A Technical Analysis of Survey Results" at 11 (1977).

phate." [57] Monsanto's CEO, Richard Mahoney, subsequently wrote to the Committee stating that later tests of the fiber showed no evidence of health problems, that the first test was not done to determine the health risk to humans, and that the product was kept off the market solely because of concerns about "unwarranted litigation".[58] However, this letter does not explain why the first test would have been done if not to examine risks to human health.

Copper 7 IUD: Supporters of S. 1400 claim that this product, although safe, was taken off the market because of unwarranted product liability suits. The court in *Kociemba* v. *Searle*, 707 F. Supp. 1517 (D. Minn. 1989), (settled w/out appeal), a Copper 7 case, stated that the plaintiff "presented evidence which would have allowed a reasonable jury to conclude that defendant knowingly placed millions of American women, especially [women wo have not had children], at risk of serious infection, loss of fertility, and surgery for removal of internal organs" and that "responsibility for this conduct was shared throughout defendant's corporate hierarchy, and that the conduct continued for over ten years." Michael Ciresi, the lawyer who litigated many Copper 7 cases for plaintiffs, has written to the Committee stating that his firm spent millions of dollars on discovery of documents that Searle resisted through litigation to the Supreme Court. Cases litigated before completion of that discovery were not successful because of the lack of documentation. According to Mr. Ciresi, the documents ultimately obtained demonstrated that the company knew the product was dangerous to women who have never had children, but continued to market the product to those women. This action by the company was the basis for punitive damages against the company.[59]

Sturm Ruger "Old Model" single action revolver: This product has been cited by the proponents of S. 1400 as one which was the victim of unreasonable verdicts based on injuries that were really due to plaintiff negligence. However, documents submitted by a witness at the Committee's May 10, 1990 hearing demonstrated that since 1962 Ruger had received reports of serious injuries and deaths resulting from accidential discharges of this gun. In 1968, the gun failed a test for accidential discharge performed by the Bureau of Alcohol, Tobacco and Firearms, and it subsequently failed Ruger's own tests.[60] Ruger did not redesign the gun to add a transfer bar safety device until 1973, and estimated that between 1968 and 1973 more than 150,000 "old models" were sold.[61] Bill Ruger, CEO of the company, testified during product liability litigation that no safety device was put on the gun because a revolver "is supposed to be designed in the traditional way." [62] The Court,

---

[57] EPA and Landrigan documents submitted with statement of Linda Lipsen, Consumers Union, at Consumer Subcommittee Hearing on S. 1400, 5/10/90.

[58] Letter from Richard Mahoney to Senator Richard H. Bryan dated May 17, 1990, reprinted in record of Consumer Subcommittee Hearing on S. 1400, 5/10/90.

[59] Statement of Michael Ciresi, submitted for record of Consumer Subcommittee Hearing on S. 1400, 4/5/90.

[60] Supplemental statement of Linda Lipsen, Consumers Union, submitted for record of Consumer Subcommittee Hearing on S. 1400, 5/10/90.

[61] Deposition of William B. Ruger (hereafter "Ruger deposition"), *Dodge* v. *Ruger*, at 219. Alaska Supreme Court, Case No. 74-564 (January 25, 1977).

[62] Ruger deposition at 100. *See also*, Ruger deposition at 3, 78-89, 100, 193-211.

in *Sturm* v. *Day,* 594 P.2d 38, 47 (Sup. Ct. Alaska 1979), found Ruger liable for punitive damages for failure to add a safety device. According to testimony before the Committee, by 1989 about 230 product liability claims had been filed against Ruger for this defect, but the gun has never been recalled.[63]

Puritan-Bennett anesthesia gas machines: This was cited by some witnesses as a product unjustly affected by the product liability system and ultimately removed from the market by the manfacturer. The machines were implicated in 4 deaths in 1983–1984. Hearings in the House Energy and Commerce Subcommittee on Oversight and Investigations, September 24, 1984, found that the company failed to notify the Food and Drug Administration (FDA) of deaths that were caused by an overdose of anethesia due to swelling of "O" rings and resultant sticking of a valve. This problem was known in the 1970s, and reflected in an appendix to the 1979 voluntary standard for anethesia machines. The FDA, testifying before the subcommittee in 1984, stated that the company "appears . . . [to have] failed to conduct adequate design review of certain critical components" including use of certain rubberlike materials in the presence of high conentrations of anesthetic gas. According to written testimony submittted to the Committee, the company instituted a limited recall, and the FDA required the recall extended to all valves distributed through July 1984.[64]

CJ–5 and CJ–7 Jeeps: These vehicles were cited by hearing witnesses as examples of products subjected to unjust litigation. In response to this assertion, other witnesses said that these Jeeps are designed with narrow track width, a high center of gravity, and short length, and consequently have a propensity to roll over, even at low speeds. The Federal Trade Commission (FTC) in 1982 issued a complaint charging AMC with unfair and deceptive advertising because the Jeeps were portrayed as safe for reckless, off-road driving. The Insurance Institute for Highway Safety found these Jeeps to have a rollover risk between 12 and 19 times greater than regular passenger vehicles. According to testimony submitted to the Committee, AMC continually denied any problem, and continued to market the Jeeps until they were subjected to product liability suits. This model Jeep has now been taken off the market.[65]

Ortho contraceptives: Witnesses at the Committee's hearings claimed these products were unfairly subjected to product liability actions, citing *Wooderson* v. *Ortho,* 681 P.2d 1038, cert. denied 105 S.Ct. 365 (1984). In that case, it was claimed that the company was held liable for failure to warn even though the FDA had determined that the warning was not necessary. However, an examination of the Court's decision reveals that the Court held that there was no clear determination by the FDA as to whether such a warning was necessary, so that the defense was not valid. Ortho was held liable by the Court for punitive damages because it ignored substantial evidence that its product caused renal failure.

---

[63] Lipsen statement, *supra,* note 60.

[64] Supplemental statement of Linda Kipsen, *supra,* reprinted in record of Consumers Subcommittee Hearing on S. 1400 5/10/90.

[65] Supplemental Lipsen statement, *supra,* reprinted in record of Consumer Subcommittee Hearing on S. 1400, 5/10/90.

Taking all the evidence presented on both sides of these issues, I am not prepared to conclude that the current product liability system is not working properly to insure the safety of new products.

S. 1400 IS SUBSTANTIVELY FLAWED

Enactment of S. 1400 would amount to legislation which dramatically revises our current legal system without any serious factual predicate for such a change. In addition to this flaw as a matter of policy, it has numerous substantive legal problems.

Non-uniform Selective Preemption

S. 1400 is touted as a move toward a more uniform system of product liability law through Federal preemption of State law. It is important to look carefully at how this preemption would work, because it is not uniform, and, it is one-sided preemption. It covers only certain areas of State law and, in those areas it addresses, it revises the law only in the states that currently have law favorable to the plaintiffs. It would leave the State law intact if that State law currently favors defendants.

For example, section 303 of the bill purports to establish "Uniform Standards For Award of Punitive Damages." It establishes the burden of proof for punitive damages, and provides a defense to punitive damages for drugs or aircraft that have been approved by Federal authorities. However, by its terms, it applies to punitive damages only "if otherwise permitted by applicable law . . . ." Thus, in States which have, through State law, eliminated or limited punitive damages, this bill would not restore the availability of such damages. In some States, there would be no right to punitive damages; in some States they would be capped at a stated amount; and in other States they would be available if the burden of proof in S. 1400 is met. I do not call that a uniform law of punitive damages. If we truly wanted uniformity we, at a minimum, would restore punitive damages in the States that have limited them so that the law would be consistent nationwide.

Even if this bill were to make the law on punitive damages more uniform, it would have little effect on the product liability system. This is because punitive damages are not a significant factor in product liability cases. As Professor Eisenberg has stated, "[t]here is a widespread perception that punitive damages are awarded frequently and in great amounts. Yet every serious study of the area finds that punitive damage awards are relatively infrequent, that they usually are commensurate with the defendant's wrongdoing, and that they bear a substantial relationship to the size of the compensatory awards. . . . [P]unitive damages are awarded in not more than one percent of filed cases . . . "[66] The 1989 GAO Report also looked at punitive damages, and found that, on the few occasions when they were awarded, their amount had a high correlation with the amount of compensatory damages.[67]

---

[66] Testimony of Professor Theodore Eisenberg, Responses to post-hearing questions of Senator Rockefeller, *supra*, at 4–6 and authorities cited therein.

[67] 1989 GAO Report, *supra*, at 27.

Another example of this selective preemption of State law is in the area of joint and several liability for damages. Section 306 states that "the liability of each defendant for noneconomic damages shall be several only and shall not be joint." However, it does not restore the availability of full noneconomic damages in States in which such damages have been capped at a certain amount. It does not restore joint and several liability for economic damages in States in which such liability has been limited by State law. So, again, we will not have a uniform nationwide law on joint and several liability. We will have some States that have no joint and several liability, some that have joint and several liability only in certain circumstances, and some that follow the rule of S. 1400. This is hardly uniform.

Additionally, the bill provides a Federal rule of law to be interpreted by both the State and the Federal courts, although the State courts are not bound by the decisions of Federal courts other than the Supreme Court.

As Professor Eisenberg testified,

> . . . for a period of time, at least, predictability may be reduced rather than increased. Each state will have to decide the scope of S. 1400's preemption and its relation to state tort law. The interaction between state and federal law in tort will be made more rather than less complex. . . . [U]niformity will not be quickly, if ever, achieved. . . . [We] are at risk of having not just 55 jurisdictions but an additional dozen federal courts of appeals making products law. At least before enactment of S. 1400 the [federal] courts of appeals should have felt bound by state law. Until the Supreme Court speaks, it is not clear that state supreme courts would or should be bound by federal interpretations of S. 1400 as it interacts with the relevant state law.[68]

Defense Based on FDA or FAA Approval

Section 303 creates an absolute defense to the award of punitive damages ("[p]unitive damages shall not be awarded") if a drug or medical device has received pre-market approval by the FDA (so long as that approval was not based on misrepresentations or bribes by the manufacturer to the FDA). Section 303 also creates an absolute defense against punitive damages for aircraft if the aircraft were subject to pre-market certification by the Federal Aviation Administration (FAA). In effect, this section makes the FDA and the FAA the first and last line of defense against manufacturer misconduct that is harmful to consumers. These agencies were never created to function in this manner, and there are numerous examples of their inability to afford this protection to consumers. Federal standards are minimum standards in most cases, and it is inappropriate to establish categorically this level as the only necessary level of safety that must be met in all cases.

---

[68] Testimony of Professor Theodore Eisenberg, Cornell Law School, Responses to post-hearing questions of Senator Rockefeller at 3. *See also* Note, "Authority in State Court of Lower Federal Court Decisions on National Law," 48 Columbia L.Rev. 943, 954 (1948); Stern and Grossman, *Supreme Court Practice* (5th ed. 1978) at 280; *Testa* v. *Katt*, 330 U.S. 386 (1947).

1. *Food and Drug Administration.*—The House Government Operations Subcommittee on Human Resources and Intergovernmental Relations has devoted considerable time and resources, from 1983 to the present, conducting extensive investigations into the FDA's activities with respect to particular drugs. The Chairman of that Subcommittee, Representative Ted Weiss, has written to the Committee expressing serious concern about section 303 of S. 1400, stating: "I believe that any proposal that would deprive parties injured by drugs and devices of punitive damages relief currently provided by State law would diminish manufacturers' incentives to produce safer products, thereby putting consumers at greater risk." [69]

Representative Weiss' letter contains numerous examples of drugs which were approved by the FDA despite the existence in FDA files of information about harmful effects of the drug. For example:

> The FDA failed to review all significant safety information *in its possession* concerning the new drug *Oraflex* prior to approving the drug for marketing. FDA had received several reports of Oraflex-associated liver and kidney disease during pre-market clinical trials of the drug. Nevertheless, the agency approved labeling that . . . mentioned nothing about liver disease and . . . denied altogether any evidence of kidney disease. . . .[70] Only 3 months following FDA approval, the manufacturer withdrew Oraflex from the market after it was implicated in numerous reports of serious and sometimes fatal liver and kidney disease.[71]

Similarly, the FDA approved the new drug Versed, a sedative, in 1985, at doses that were substantially higher than those shown to be effective in published studies dating back to 1982, and without knowing how the drug was regulated in foreign countries. The FDA finally lowered the recommended dose in 1987 to levels that had been in effect in Europe for several years.[72]

The defense established by S. 1400 also overlooks the fact that "important evidence regarding drug safety problems sometimes does not surface until after FDA approval." [73] Indeed, GAO recently issued a report on this issue which contained some alarming statistics. GAO found that:

> . . . of the 198 drugs approved by FDA between 1976 and 1985 for which data were available, 102 (or 51.5 percent) had serious postapproval risks, as evidenced by labeling changes or withdrawal from the market. . . . The serious postapproval risks are adverse reactions that could lead to

---

[69] Letter dated May 7, 1990, from Rep. Ted Weiss, Chairman, Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations, to Senator Ernest F. Hollings, Chairman, Committee on Commerce, Science and Transportation, at 1. Letter available in Consumer Subcommittee files.

[70] Weiss letter, *supra*, at 2 (emphasis in original). *See also* H.R. Rep. No 98-511, "Deficiencies in FDA's Regulation of the New Drug 'Oraflex'," 98th Cong., 1st Sess. (1983), at 4-6.

[71] Weiss letter, *supra*, at 2. *See also* H.R. Rep. No. 98-511, *supra*, at 8-13.

[72] Weiss letter, *supra*, at 2. *See also*, H.R. Rep. 100-1086, "FDA's Deficient Regulation of the New Drug Versed," 100th Cong., 2d Sess. (1988), at 10-27.

[73] Weiss letter, *supra*, at 2.

hospitalization, increases in the length of hospitalization, severe or permanent disability, or death.[74]

These are only a few of the examples which amply demonstrate why we cannot responsibly rely only on the FDA to protect consumers from all the dangers of drugs. It is argued that S. 1400 only protects manufacturers from the award of *punitive* damages, and that this is reasonable once they have achieved FDA approval for their product. It is certainly true that, in many cases in which defective drugs are approved by the FDA, the manufacturer should not be held liable for punitive damages. Indeed, awards of punitive damages in product liability cases are exceedingly rare.[75] However, problems with drugs that have achieved FDA approval are prevalent, and there are documented cases in which the manufacturers' misconduct was a primary factor in the continued marketing of such products.[76]

Given this information, we should not conclude, as S. 1400 does, that there could never be circumstances in which punitive damages should not be awarded for manufacturers' misconduct. The proper course is to leave that decisioin where it is now—with the jury and the court.

2. *Federal Aviation Administration.*—Similarly, it would be inappropriate to eliminate any potential for punitive damages for aircraft based on FAA approval of the aircraft design. The possibility of punitive damages provides an important deterrent which helps insure that manufacturers police themselves, and do not rely on the FAA to uncover any defects. Moreover, the FAA is required to set only minimum safety standards "in the interest of safety". *See* 49 U.S.C. 1423(a)(1). The FAA also has a duty "to promote air commerce." 49 U.S.C. 1346. Thus, the FAA arguably may balance safety standards against the interests of commerce. Moreover, compliance with FAA standards indicates no more than that the manufacturer performed the minimum required. *See Wilson* v. *Piper Aircraft Corp.*, 577 P.2d 1322 (D. Or. 1978).

Additionally, there are real questions about the effectiveness of the FAA's safety inspection management system. GAO, in a report released on November 13, 1989, is extremely critical of this system, noting that: "[i]nadequate oversight of the inspection program resulted in (1) FAA headquarters management's being unaware that its inspection policies were not always followed by local FAA staff and (2) inaccurate reporting to Congress of FAA achievements." [77]

The effect of this inadequate inspection system on the defects in aircraft was recently recognized by the Chairman of Cessna Aircraft, who stated that: "[w]ith tougher airworthiness requirements implemented aggressively by the FAA, and with type-specific flight

---

[74] U.S. General Accounting Office, "FDA Drug Review: Postapproval Risks 1976-85," GAO/PEMD-90-15 (April 1990) at 3.

[75] Landes and Posner, "New Light on Punitive Damages," (October 1986). *See also*, Public Citizen's Congress Watch, et al., "The 'FDA Excuse' " (May 1990) at 3; Notes 66 and 67, *supra*.

[76] For example, the evidence is strong that the Copper 7 IUD, which was approved by the FDA, was known to the manufacturer to pose dangers for women who had not had children, but continued to be marketed by the manufacturer to such women for many years. The Court reviewing this conduct upheld the award of punitive damages. *See, Kociemba* v. *Searle*, 707 F. Supp. 1517 (D. Minn. 1989) (settled without appeal); "The "FDA Excuse", *supra*, at 1-2; Letter of Michael Ciresi, *supra*, note 59.

[77] U.S. General Accounting Office, "FAA's Inspection Management System," GAO/RCED-90-36 (November 1989) at 8.

standards, I believe it is realistic to reduce the level of accidents by at least 50 percent." [78] If even the aircraft manufacturers believe there is room for a 50% improvement from the FAA, it would not be appropriate to leave the FAA as the only line of defense for the safety of the flying public. We must require continued maximum vigilance from the manufacturers themselves which the existing product liability system encourages.

Statute of Repose

Section 304(b) of the bill would bar liability for any harm caused by a capital good more than 25 years after its original delivery. This would shield from liability a significant number of products in use. Howard Fark, a member of the Board of Directors of the National Machine Tool Builders Association, testified that over 50% of the claims filed against machine tool builders involve machines over 25 years old.[79]

Supporters of the provision argue that, if machines are defective, the defects will show up before the expiration of a 25 year period, so that manufacturers typically should not be liable for such products after that time. I have no reason to dispute that. However, by the same token, there has been no demonstration that there could never be a defective 26-year-old product. As long as that possibility exists, it is appropriate to leave the responsibility to decide who should be liable for harm from a product where it now exists in most states—with the jury and the court.[80]

Worker's Compensation Offset

Section 305 purports to establish uniform standards for offset of worker's compensation. Among other impacts, it would do away with the traditional lien on awards of damages from third party manufacturers that is currently available to employers who have paid workers' compensation payments for an injury. This provision is opposed, and understandably, so, by the National Association of Stevedores and the Association of General Contractors, who point out that it shifts these costs, without justification, from manufacturers to the industry that uses machinery and equipment.[81] It has been recognized that the workers' compensation insurance systems in many States are having difficulty meeting their financial obligations.[82] The cost-shifting required by S. 1400 will only exacerbate that problem for the no-fault workers' compensation system in the vain hope of reducing the costs of the tort system for third party manufacturers.

---

[78] AOPA (Aircraft Owners and Pilots Association) "Pilot" magazine, "G.A. Manufacturers Propose New Inspections," (June 1989).

[79] Testimony of Howard Fark, Vice President, Minster Machine Company, Response to Post-Hearing Questions of Senator Rockefeller at question 2, Consumer Subcommittee Hearing on S. 1400, 2/22/90.

[80] Only 17 states currently have valid statutes of repose in effect. In those states, the statutes of repose are typically shorter than 25 years. However, the majority of states have not enacted such statutes and, in, some states, the statutes have been struck down as conflicting with state constitutional rights to access to the courts or equal protection. *See, e.g., Danguard* v. *Baltic Cooperative Building Supply Association,* 349 N.W. 2d 419 (S.D. 1984); *Heath* v. *Sears, Roebuck & Co.,* 464 A. 2d 288 (N.H. 1983).

[81] Testimony of Thomas D. Wilcox, Executive Director and General Counsel, National Association of Stevedores, Consumer Subcommittee Hearing on S. 1400, 5/10/90, statement at 2.

[82] *Id.* at 2-3.

This cost-shifting also will affect the Federal Government in its position as employer, because it will be unable to obtain reimbursement from liable third parties for payments made to workers under the Federal Employees Compensation Act and the Longshoremen and Harbor Workers' Compensation Act.[83] The Congressional Budget Office, in its estimates letter on this bill, has stated that, in a two-year period, the Government recovered $9 million in such situations from liens against liable third parties. At least a sizable portion of that money will be lost by the Government under this bill.

CONCLUSION

A committee of the United States Senate should not report legislation to federalize product liability tort law without any comprehensive data to demonstrate (1) that such legislation is necessary, and (2) that such legislation will work. Unfortunately, that is the situation with S. 1400.

Do we know what we are getting into? Based on the scant evidence provided by proponents of this legislation, the answer to that question is: "obviously not." We do know that enactment of this legislation would not affect insurance premiums or businesses' product liability costs. S. 1400 will not make American businesses more competitive, and may actually undermine current levels of product safety. We are not going to solve the problems of U.S. business with legislation of this type, and, in fact, we run the risk of harming the consumer. The bill should be rejected.

ERNEST F. HOLLINGS.

---

[83] *Id.* at 1-2.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

○